(26,723)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 637.

THE NEW YORK CENTRAL RAILROAD COMPANY, PETITIONER,

vs.

WILBUR H. MOHNEY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF LUCAS COUNTY, STATE OF OHIO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 15, 1919.

1 Certified Copy

In the Court of Appeals of Lucas County.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff in Error,

vs.

WILBUR H. MOHNEY, Defendant in Error.

CERTIFIED COPY OF RECORD.

Doyle & Lewis, Attorneys for Plaintiff in Error.
Miller, Miller, Brady & Seeley, Attorneys for Defendant in Error.

Filed Apr. 10, 1918. Supreme Court of Ohio, Frank E. McKean, Clerk.

Office Supreme Court, U. S. Filed Aug. 26, 1918. James D. Maher, Clerk.

2-4 In the Court of Appeals of Lucas County, Ohio.

Petition in Error.

(Filed July 3, 1917.)

Now comes the plaintiff in error, The New York Central Railroad Company, and says that at the April, 1917 Term of the Court of Common Pleas of Lucas County, Ohio, the defendant in error, Wilbur H. Mohney, recovered a judgment by the consideration of said Court of Common Pleas against the plaintiff in error, in an action pending in said Common Pleas Court, wherein the plaintiff in error was defendant, and said defendant in error was plaintiff.

A duly certified transcript of the docket and journal entries herein and together with the original pleadings, papers and bill of exceptions are filed herewith.

Plaintiff in error avers that there is error in said record, proceedings and judgment of said Court of Common Pleas, prejudicial to this plaintiff in error in each of the following particulars, to-wit:

(1) Said court erred in giving judgment in favor of the defendant in error, when it should have been given in favor of plaintiff in error.

5 (2) The finding and decision of said Court of Common Pleas is not sustained by sufficient evidence.

(3) The finding and decision of said Court of Common Pleas is not sustained by any evidence.

(4) The finding and decision of said Court of Common Pleas is against the weight of the evidence.

(5) The finding and decision of said Court of Common Pleas is contrary to law.

(6) Said Court of Common Pleas erred in overruling the motion of the plaintiff in error (defendant below) for a new trial.

(7) For other errors of law apparent upon the record in said cause.

The plaintiff avers that in each and every of the respects hereinbefore set forth, it did, at the time duly except.

Wherefore, plaintiff in error avers that it has been aggrieved by the judgment of said Court of Common Pleas and prays that the judgment of said Court of Common Pleas may be reversed and set aside and held for naught for the errors hereinbefore specified and that the plaintiff in error may be restored to all things that it has lost, by reason of the errors hereinbefore specified and by reason of the judgment of said Court of Common Pleas.

THE NEW YORK CENTRAL RAILROAD COMPANY, *Plaintiff in Error,*
By DOYLE, LEWIS, LEWIS & EMERY,
Its Attorneys.

(Waiver omitted.)

6 Court of Appeals.

Docket and Journal Entries.

1917.
July 3. Petition in error and entry of appearance of defendant in error, filed.
Aug. 10. Brief of plaintiff in error filed in triplicate; receipt of brief filed.
Nov. 30. Brief of defendant in error filed.
1918.
Mar. 30. Judgment of Common Pleas Court affirmed; cause remanded. Jour. 3-214.
Mar. 30. Mandate issued to Court of Common Pleas. Mand. Jour. 9.

At a term of the above named court, begun and held on the 2nd day of January, A. D. 1918, among other proceedings had by and before said court on the 30th day of March, A. D. 1918, being the 75th day of said term, as appears by its journal of that day, were the following, viz:

This 11th day of February, 1918, this cause came on for hearing upon the petition in error, the transcript and the original papers and pleadings, and the bill of exceptions from the Court of Common Pleas of Lucas County, Ohio, and was argued by counsel; on consideration whereof the court find: That the defendant in error, Wilbur H. Mohney, although riding upon a pass that was good between two stations, to-wit: Air Line Junction and Collinwood, both located in the State of Ohio, was nevertheless, at the time of his injury, travelling upon an interstate journey and was not
7 an intrastate passenger, to which finding of the court, Wilbur H. Mohney, by his counsel, then and there excepted, and

does now except. The Court further finds that the pass issued to defendant in error, Wilbur H. Mohney, was issued in consideration of Mohney's employment and acceptance of employment with The New York Central Railroad Company, plaintiff in error, to which finding and order of the court plaintiff in error excepts.

The court further finds that the injury to said defendant in error, while so riding upon said interstate journey, was the result of gross, wanton and wilful negligence on the part of the plaintiff in error, to which finding and order of the court the plaintiff in error excepts.

It is therefore considered by the court that the judgment of the Court of Common Pleas aforesaid be, and the same hereby is affirmed; and that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at $—, to which order and judgment of the court plaintiff in error excepts.

No other judgments or decrees were rendered or orders and journal entries made in said cause, as appears upon the journal of said court.

(Duly certified.)

8 Common Pleas Court.

WILBUR H. MOHNEY, Plaintiff,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

Petition.

(Filed Sept. 29, 1916.)

The plaintiff states that the defendant is now and ever since long before the acts hereinafter complained of has continued to be a railroad corporation, organized, existing and doing business under and by virtue of the laws of the State of Ohio, and as such, does now and has so continued to own and operate a line of railroad extending from the City of Toledo to the City of Cleveland and other points, on which it does now and has so continued to run trains and have in its employ many and various engineers, firemen, conductors, brakemen, flagmen, telegraph operators, and train dispatchers, and does now and has so continued to op rate the said line of railroad with its accompanying block system and other appurtenances and appliances.

Plaintiff further states that on or about March 29, 1916, he was an employee of the defendant, one of its locomotive firemen; that in the early morning of the said day he was riding as a passenger upon one of the defendant's passenger trains, on transportation issued to him by defendant carrying him as a passenger from Toledo to Cleveland, Ohio, and on a train which on said morning was running in two sections, the plaintiff being seated in the rear coach of the first section of said train out of Toledo for Cleveland.

Plaintiff further states that when the said train on which he was riding approached the town of Amherst, Ohio, the said train came to a stop at one of the block signals.

Plaintiff further states that the defendant maintained and does now maintain a block signal system along its said line, and that the said block system is so constructed that it is intended and used for the purpose of signaling engineers and trainmen as to whether or not the track ahead of them is clear and of warning them of the danger of trains which are ahead of them on the same track, and that when a train is at one given point on the said line of track, the said block system is and was so constructed and operated that at a place or places approximately a mile to the rear of the said given point, signals were and are displayed showing to engineers and other trainmen coming up from behind on the same track, that the track ahead of them is not clear and that to proceed along the said track would result in a collision.

Plaintiff further states that the defendant was grossly negligent and careless at said time in that when the train on which he was a passenger had stopped near Amherst, Ohio, the engineer of the second section of said train was grossly negligent and careless in that he did not look for, see or observe the danger signals which
10 were displayed along the line far in the rear of the train of which plaintiff was riding and which showed that the track ahead of the said second section was not clear and that to proceed along the said track would result in a collision.

Plaintiff further states that notwithstanding the fact that said danger signals were displayed the said engineer of said second section, with gross carelessness, ran his train along the said track approaching plaintiff's train, at a high speed, notwithstanding said danger signals and contrary to the known and established rules of the defendant which its said engineer and servant negligently failed to obey, and collided with the rear end of plaintiff's train, plowing through the coach in which plaintiff was riding, whereupon the said coach was broken up and knocked off the track on to another track, along which immediately thereafter another fast train of the defendant proceeded in an opposite direction and ran into the said wreck and the said car.

Plaintiff further states that the said defendant, so acting through its engineer and servant, was grossly negligent and careless in the operation of the said second section which was following the first section on which plaintiff was riding, all when the said defendant knew or in the exercise of proper care should have known that in so operating the said second section, without looking for, seeing or observing the said danger signals and in disobedience of the known and established rules of defendant, it thereby placed plaintiff
11 and other passengers in imminent danger of injury.

Plaintiff further states that at the time of said accident he was in the exercise of due care and without fault which in any way contributed to the injuries which he received at said time, and that the direct and proximate cause of the said accident and of his injuries was the gross neglect and carelessness of the defendant as is hereinbefore related.

Plaintiff further states that in said accident he sustained a fracture of the skull, so that within a short time thereafter it was necessary

for surgeons to trephine the same and to remove a portion of the bone; that he sustained a fracture of the nose and a severe shock to his nervous system, was severely wrenched and bruised over his entire body; that as a direct result of the injuries sustained at the said time, he was for some time unconscious, was removed to a hospital and there treated for some weeks; that all together on account of said injuries he has suffered impairment of the eye-sight and vision, impairment of his hearing, inability to breathe through his nose, weakness of body, nervousness, headaches, vertigo, dizziness and severe pains in his back.

Plaintiff further states that the said injuries have caused him to have ill health, to suffer loss of sleep, and do now as well as ever since the time of receiving the said injuries, cause great pain and anguish.

Plaintiff further states that on account of said injuries, he has suffered a loss of earnings and an impairment of his earning
12 capacity and ability to make a living, and that all of his injuries have been and are to his damage in the sum of $50,000.00.

Wherefore, plaintiff prays judgment against the defendant in the sum of $50,000.00, for his costs of court and for such other relief as is equitable and proper.

WILBUR H. MOHNEY,
Per MILLER, MILLER, BRADY & SEELEY
His Attorneys.

(Verification and præcipe omitted.)

Court of Common Pleas.

Answer.

(Filed Nov. 17, 1916.)

Now comes the above named defendant and for its answer to the petition herein, says, that it admits that the defendant is now and was, at the times mentioned in the petition herein, a railroad corporation, organized under the laws of the State of Ohio, and owning and operating a line of railroad extending among other places, from the City of Toledo, Ohio, to the City of Cleveland, Ohio; admits that on or about the 29th day of March, 1916, plaintiff was in the employ of the defendant as a locomotive fireman; admits that on said day, he was riding as a passenger upon one of the defendant's passenger trains on transportation issued to him by the defendant company, and that at said time, plaintiff was riding on a train running in two sections, and that the plaintiff was, at said time, occupying a seat
13 in the rear coach of the first section of said train; admits that when said train upon which plaintiff was riding approached the town of Amherst, Ohio, said train came to a stop; admits that defendant did, at the times mentioned in the petition herein, maintain what is known as a "block system"; defendant admits that while

said train upon which plaintiff was riding, was at a stop at or near Amherst, Ohio, the second section of said train collided with the train on which plaintiff was riding, and that as a result of said collision, plaintiff sustained injuries, the exact nature and extent of which, defendant is not advised.

Defendant denies each and every other allegation contained in said petition.

Defendant says that those in charge of the second section of said train were unable to, and did not see the so-called "block signals", for the reason that said signals were at said time, covered by a sheet of fog, so that they could not, and were not observed by the engineer in charge of said second section.

Second Defense.

For its second defense to the petition herein, defendant says that, at the time of the injuries complained of in said petition, plaintiff herein was a passenger on defendant's train, riding on a free pass, issued by defendant and good between Collinwood, Ohio and Air Line Junction, Ohio; that plaintiff was at said time on an interstate journey, from the City of Toledo, Ohio, to the City of Pittsburgh,
14 Pennsylvania; that while using said pass on said 29th day of March, 1916, plaintiff was travelling on matters wholly personal, and in no manner connected with his employment with the defendant company; that said pass on which said plaintiff was riding as a passenger, was issued to the plaintiff gratuitously under the provisions of a statute of the United States, known as the Hepburn Act of June 29th, 1906, (Federal Stat. Ann. 1909, Supp. 255); one of the conditions endorsed on said pass, and agreed to by the plaintiff herein, was the following:

"In consideration of receiving this free pass each of the persons named thereon, using the same, voluntarily assumes all risk of accidents and expressly agrees that the Company shall not be liable under any circumstances, whether of negligence of itself, its agent, or otherwise, for any injury to his or her person, or for any loss or injury to his or her property; and that as for him or her, in the use of this pass, he or she will not consider the Company as a common carrier, or liable to him or her as such."

Wherefore, defendant having fully answered, prays that it may be hence dismissed with its costs.

DOYLE, LEWIS, LEWIS & EMERY,
Attorneys for Defendant.

(Duly vertified.)

15 Court of Common Pleas.

Reply.

(Filed May 5, 1917.)

Comes now Wilbur H. Mohney, plaintiff in the above entitled action and for reply to the answer of defendant heretofore filed

herein, denies each and every allegation and part of allegation in said answer contained excepting such allegations as are admissions of allegations made in plaintiff's petition.

For further reply, this plaintiff alleges that the transportation on which he was riding at the time of his injury, was issued to him by the defendant for a valuable consideration namely, his acceptance of employment and employment as one of defendant's locomotive firemen.

Wherefore plaintiff renews his prayer for judgment as in his petition contained.

WILBUR H. MOHNEY,
Per MILLER, MILLER, BRADY & SEELEY,
His Attorneys.

(Duly vertified.)

Court of Common Pleas.

Motion.

(Filed June 4, 1917.)

Now comes The New York Central Railroad Company, defendant herein, and moves the court for an order setting aside the
16 finding and decision of the court for a new trial herein for the following reasons:

(1) That the finding and decision of said court is not sustained by sufficient evidence.

(2) That the finding and decision of said court is not sustained by any evidence.

(3) That the finding and decision of said court is against the weight of the evidence.

(4) That the finding and decision of said court is contrary to law.

(5) That the finding and decision of said court was in favor of the plaintiff when it should have been in favor of the defendant.

(6) For other errors of law occurring at said trial to the prejudice of the defendant.

DOYLE, LEWIS, LEWIS & EMERY,
Attorneys for Defendant.

Common Pleas Court.

Docket and Journal Entries.

1916.

Sept. 29. Petition and præcipe filed; Summons for defendant issued and delivered to sheriff. Ans. Oct. 28, 1916.

Oct. 9. Summons filed, endorsed as follows, viz: Received this writ Sept. 29, 1916, and pursuant to its command I summoned on the 2nd day of October, 1916, the within named defendant, The New York Central Railroad Com-
17 pany, by delivering to F. M. Dirks, a regular ticket agent for said company, a true and certified copy of this

writ with endorsements thereon. Robert S. Gardner, Sheriff, by C. Whitaker, Deputy. $1.15.

Oct. 30. Defendant may answer by November 4, 1916. Jour. 182-189.

Nov. 17. Answer filed.

1917.

Jan. 15. Demurrer to second defense in answer filed.

Feb. 9. Above demurrer overruled; exceptions. Jour. 184-361.

May 5. Reply filed.

June 4. Motion for new trial filed.

June 9. Decree rendered, finding for plaintiff in the sum of $9,750.00. Motion for new trial overruled. Judgment as above stated and for costs. Defendant excepts; may file Bill of Exceptions within forty days. Jour. 188-375.

July 3. Bill of Exceptions of defendant filed.

July 3. Time for delivery to judge waived.

July 3. Proceedings in Error seeking to reverse Judgment in Common Pleas Court instituted in Court of Appeals. See No. 628 C. A.

July 5. Bill of Exceptions delivered to Hon. B. F. Ritchie.

July 5. Bill of Exceptions received from Hon. B. F. Ritchie.

At a term of the above named court, begun and held on the
18 11th day of September, A. D. 1915, among other proceedings had by and before said Court on the 30th day of October, A. D. 1916, being the 42nd day of said term, as appears by its Journal of that day, were the following, viz:

This day leave was granted said defendant to answer by November 4th, 1916.

On the 9th day of February, 1917, being the 29th day of the January 1917 Term, an order was made in said cause, an entry of which appears on the Journal of this Court in the words and figures as follows, to-wit:

This cause comes on this day for hearing upon the demurrer of plaintiff to the second defense of the answer of defendant and was heard upon the oral arguments of counsel and upon the written brief of the defendant only.

Whereupon the court being so advised in the premises finds that the said demurrer is not well taken and overrules the same. Thereupon the plaintiff by his counsel then and there excepted to the aforesaid ruling of the court and does now except.

On the 9th day of June, 1917, being the 59th day of the April 1917 Term, a judgment was rendered in said cause, an entry of which appears upon the Journal of this court in the words and figures as follows, to-wit:

This cause came on this 2nd day of June, 1917, for hearing upon the pleadings and the stipulations and other evidence, a jury having been waived by both parties hereto.

Whereupon the court finds, upon the issues joined, that the
19 allegations of the petition and reply of the plaintiff are sustained by the evidence and are true.

The court further specifically finds that at the time of receiving his injuries, March 29th, 1916, the plaintiff was riding as a passenger upon one of defendant's passenger trains between points all within the State of Ohio; that the transportation upon which plaintiff was riding at said time, entitling him to ride upon said train between Toledo, Ohio, and Collinwood, Ohio, was issued to plaintiff by the defendant for a valuable consideration, namely, the plaintiff's acceptance of employment and employment as one of defendant's enginemen assigned to the duties of fireman; that at said time the plaintiff was on an intrastate journey, riding on said intrastate transportation, and that the wreck occurring near Amherst, Ohio, on said date and in which plaintiff received the said injuries, was occasioned by the gross negligence of the defendant.

Whereupon the court finds in favor of the plaintiff, and assesses his damages in the sum of $9,750.00.

Thereupon the defendant, by its counsel, then and there duly excepted to each and every foregoing findings of the court against it and does now except.

Thereupon, on the 4th day of June, 1917, and within three days from the said findings and decisions of the court, the defendant duly filed in writing, its motion for a new trial in said cause, upon the several grounds stated in said motion. Thereupon, on the 8th day of June, 1917, came the parties hereto, by their attorneys, and said motion for a new trial duly came on for hearing, and was submitted to the court. Upon consideration whereof, and being fully advised, the court overruled said motion, to which ruling and order of the court, the defendant excepted.

And the court now proceeding to render judgment, in accordance with its said finding and decision, it is considered, ordered and adjudged, that the plaintiff have and recover from the defendant the sum of $9,750.00, in default of payment whereof execution shall issue therefor, to all of which findings, order and judgment, the defendant duly excepted and asked and was allowed forty days within which to prepare and file its Bill of Exceptions herein, as provided by law.

No other Judgments or Decrees were rendered, or Orders or Journal Entries made in said cause, as appears upon the Journal of said court.

(Duly certified.)

Court of Common Pleas.

Bill of Exceptions.

Be It Remembered, that at the trial of the above entitled action, in the Court of Common Pleas of Lucas County, Ohio, at the April, 1917, Term of said court, to-wit on the 7th day of May, 1917, thereof, before the Honorable Byron F. Ritchie, Judge of said court, a jury having been waived by both parties hereto, the following proceedings were had:

21 It is stipulated and agreed between the parties hereto as follows:

1. That the plaintiff was, on March 29th, 1916, and for some time prior thereto, in the employe of the defendant as a locomotive fireman, who had been promoted to an engineer, but had not yet been assigned to an engineer's run.

2. That New York Central employe's pass No. D O 944, good between Collinwood, Ohio, and Air Line Junction, Ohio, which is marked Exhibit 1, and is attached to this bill of exceptions and made a part hereof, was issued to the plaintiff by the defendant company.

3. That The New York Central Company was, on March 29th, 1917, and for some time prior thereto, an interstate railroad company, owning and operating a line of railroad from the City of Chicago, State of Illinois to the City of New York in the State of New York.

4. That on the early morning of March 29th, 1916, the plaintiff boarded what is known as train "First 86" at Toledo.

5. That the plaintiff presented his employe's annual pass, Exhibit 1, to the conductor of said train for transportation for Toledo to Cleveland.

6. That the passenger train upon which the plaintiff was riding on said 29th day of March, 1916, was, with the exception of the mail car thereon, a train containing cars from the City of Detroit, Michigan and the City of Toledo, Ohio, through to the City of Pittsburg, Pennsylvania.

22 That said train ran over the line of The New York Central Railroad Company to Cleveland, and over the line of The Erie Railroad Company from Cleveland to Youngstown, both in the State of Ohio, and from Youngstown to Pittsburg over the line of The Pittsburg & Lake Erie Railroad.

7. That at the request of the plaintiff, a trip pass in favor of the plaintiff and his wife was secured by the defendant company, and left with the agent of the defendant company at the station in Youngstown, Ohio, providing transportation for the plaintiff and his wife from Youngstown, Ohio, to Pittsburg, Pennsylvania, over the line of the Pittsburg & Lake Erie Railroad Company.

8. That a trip pass was, at the request of the plaintiff's wife, issued by the defendant company, providing for the transportation of the plaintiff and his wife between the City of Toledo and the City of Youngstown.

9. That while on said train between the cities of Toledo and Cleveland, the car in which the plaintiff was riding was wrecked, and as a result thereof the plaintiff sustained certain injuries.

10. The following language appears on the back of said pass D O 944, Exhibit 1 herein:

"Not good on Main Line 6, 19, 22, 25 or 26; or 21 and 43 on Toledo Division.

Conditions.

In consideration of receiving this free pass, each of the persons named thereon, using the same, voluntarily assumes all risk
23 of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence

of itself, its agents, or otherwise, for any injury to his or her person, or for any loss or injury to his or her property; and that as for him or her, in the use of this pass, he or she will not consider the company as a coinmon carrier, or liable to him or her as such.

And, as a condition precedent to the issuing and use thereof, each of the persons named on the face of this pass states that he or she is not prohibited by law from receiving free transportation, and that the pass will be lawfully used.

If presented by any other than the person or persons named thereon, the conductor will take up this pass and collect fare.

I agree to the above conditions.

(Signed) W. H. MOHNEY.
To be signed in ink."

and it is admitted that the handwriting thereon is the signature of the plaintiff herein.

11. That the plaintiff is one of the parties designated in the so-called "Hepburn Act" of June 29th, 1906, as one to whom a pass may issue, as well as designated in the statutes of Ohio relative to the subject of the issuance of passes to railroad employes.

Exhibits One, Two, Three and Four, were offered and admitted in evidence, and are attached to this bill of exceptions, and made a part hereof.

24 The plaintiff, further to maintain the issues on his part, called as a witness WILBUR H. MOHNEY, who having been first duly sworn, on oath, testified as follows:

Direct examination.

By Mr. Miller:

Q. Your name is Wilbur H. Mohney?
A. Yes, sir.
Q. You are the plaintiff in this case?
A. Yes, sir.
Q. In the early morning of March 29th, 1916, you boarded the New York Central train at Toledo, here, first section of No. 86, did you?
A. Yes, sir.
Q. What coach did you occupy on that train?
A. The rear coach.
Q. That was what type—Pullman—or——
A. Day coach.
Q. You had transportation entitling you to ride on that train?
A. Yes, sir.
Q. Handing you Exhibit 1, will you please tell us when you boarded that train, or shortly thereafter, what if anything was done with that card? What if anything did you do with it? Show it to anybody, or anything of that kind?
A. Showed it to the conductor when he came through the train.

Q. And that is the card, Exhibit 1,—the pass, or whatever you call it,—on which you were riding on that train?

A. Yes, sir.

25 Q. On that morning you were going to the City of Cleveland, were you?

A. Yes.

Q. And were you going beyond the City of Cleveland?

A. Yes, sir.

Q. From the City of Cleveland, what other city were you bound for?

A. Pittsburgh.

Q. What was you route?

A. By the way of Youngstown over the Erie from Cleveland, and the P. & L. E. from there to Pittsburgh.

Q. Leaving Cleveland, what city were you bound for?

A. Youngstown.

Q. How were you to get to Youngstown?

A. On that train, over the Erie.

Q. Over the Erie Railroad? What particular car do you mean you were going from Toledo to Youngstown in?

A. My understanding was, that car was going on through.

Q. Where?

A. To Youngstown.

Q. What if any transportation did you carry, or were you to get, from Cleveland to Youngstown?

A. I didn't have any, only by the way of Ashtabula.

Q. I am talking about from Cleveland to Youngstown. How had you intended getting from Cleveland to Youngstown?

A. Paying my fare.

Q. Paying you fare on that train?

A. On that train.

Q. What was your errand, if any, in the City of Youngstown?

A. Well, when I got to Youngstown I intended to call up my brother in law there, and see if they had made any arrange-

26 ments about my mother's funeral, which I was going to at the time.

Q. Had you had any notice as to where the funeral was to be held, at that time?

A. Not a particle; I didn't know where it was going to be at that time.

Q. Who was your brother in law?

A. His name is Weadock.

Q. Where did he live?

A. Eight or nine miles south of Pittsburgh; Option is the post-office, but I can't remember the name of the town.

Q. He is the B. & O. agent at that station?

A. He is B. & O. agent at that station, but I can't remember the name of the station.

Q. Where did your mother die?

A. At that place.

Q. Where might she have been buried?

A. Our old burying ground is up in Pennsylvania, where all the rest of them are buried.
Q. How far from that place?
A. About a hundered and fifty miles north of Pittsburgh.
Q. Then there was also a grave yard near Option?
A. Near Option, where they did finally bury her.
Q. Going back, then, what was your intention, or what plan had you made, at Youngstown?
A. Well, to call him up there, and I had arrangements made there for a pass——

The Court: Where did this injury occur; between Cleveland and Youngstown?
Mr. Miller: Between Toledo and Cleveland; Amherst.

27 Q. What else were you to do at Youngstown?
A. That train out of Pittsburgh. I found I could not make connection—it didn't leave there right—there are only two trains a day, a little jerk water road and only two trains a day stop at that place, about four o'clock; I found that out before I got there; so I imagined the way I would work it, I would loaf around there, if I got the pass, and visit with some of the follows. I used to work in there on the Pea Vine, and I would rather hang around there where I knew some of them than hang around Pittsburgh three or four hours.
Q. And you would call up your brother in law from there?
A. Call up my brother in law; that was my intentions.
Q. What fellows do you know at Youngstown?
A. All those fellows that used to work on that branch that I used to work on, that I used to work with.
Q. Did you get to Youngstown?
A. Not quite.
Q. Did you get to Cleveland?
A. Not yet.
Q. Now what happened as you were in the rear coach of First 86, on your way to Cleveland, that morning?
A. You will have to ask somebody that knows; I was asleep.
Q. Where did you wake up?
A. In the hospital.
Q. You found that was the Elyria Hospital, was it?
A. Yes.
Q. This Exhibit 1 on which you rode to the point of the wreck, Amherst, had been turned over to you by whom? By what company?
A. The New York Central.
Q. When?
A. About the first of the year.
28 Q. The first of the year 1916? At that time what was your employment?
A. I was fireman.
Q. With the rank of what?
The Court: What time was this turned over to you?
A. About the first of the year, I should judge.
Mr. Miller: January 1st, 1916?

A. Yes, sir.

Q. At that time you were fireman with the rank of engineer, and hadn't yet been assigned to a run; that is true?

A. Yes, sir.

Q. And where did you run as fireman, what line?

A. Between Air Line Junction and Collinwood.

Q. At the time of this wreck in March, was that your run?

A. Yes, sir.

Q. And had been for how long a period?

A. I had been in the employ of the company about six years and three months.

Q. Was this the first card of this kind, Exhibit 1,—the first one you had ever gotten from the defendant?

A. No.

Q. You had had other ones before that?

A. Yes, sir.

Q. How often did you get them?

A. Well, at first, they were issued quarterly, and then extended to six months, and then I think they finally extended them to annual.

Q. What if any conversation or dealings did you have with any one, at the time your first card was issued to you?

29 A. I just asked the engine dispatcher for the pass.

Q. What if anything was said?

A. He said I could not have any until I had been in the employ a certain length of time, of the company.

Q. He didn't say "a certain length of time." Give us the conversation; what you asked, and what he said in reply.

A. Well, you had to be an employee of the company about six months before you could have a pass issued to you.

Q. What did you ask him?

A. Asked him for a rate book and a pass.

Q. What is a rate book?

A. That is the scale of wages you are working on.

Q. That a fireman gets?

A. That a fireman gets.

Q. When you asked him for the rate book, and your pass, what did he say?

A. He said I could not have it until I had been in the employ of the company a certain length of time, six months; I think that was the length of time then.

Q. What if anything did he say about your getting a pass at the end of that time, or anybody having a pass?

A. He said they didn't get them—didn't issue them—until they had.

Q. Did he tell you when you would get one, or anybody would get one?

A. At the end of six months, a fireman. I think they give them to them now at the end of thirty days.

Q. Then did you get a pass at the end of six months?

A. Yes, sir.

30 Q. And have you had a pass ever since?

A. Yes, sir.

Q. This card, Exhibit 1, is the last card you have ever had?
A. Yes, sir.
Q. I understand there had been issued by the company a pass entitling you to ride from Toledo to Youngstown, by the way of Cleveland and Ashtabula?
A. Yes, sir.
Q. Did you ride on that pass?
A. No, sir.
Q. Did you ever ride on any pass issued, which entitled you to transportation from Youngstown to Pittsburgh?
A. Previous to this time?
Q. No; any pass that was issued to you at that time.
A. No, sir; I never saw it, even.
Q. What if anything was ever said to you by any roadmaster or locomotive master—whatever you call it—about issuing passes to employes?
A. None that I ever know; the engine dispatcher generally handed me the pass.
Q. What did the engine dispatcher have to say to you about the pass?
A. Well, when my time was up—my six months—I got my pass, when it was issued.
Q. Did he ever say anything to you about issuing a pass to the employes?
A. He said they all received them when they had been in the service for six months.

Cross-examination.

By Mr. Lewis:

Q. When was your mother's funeral to be, Mr. Mohney?
A. I don't know a thing about it, any more than you do.
31 Q. You were on your way to attend her funeral?
A. Yes, sir.
Q. Did you know when the funeral was to occur?
A. No, sir; I didn't even know the day she died.
Q. You knew that she was dead?
A. Yes.
Q. But not when the funeral would be?
A. No.
Q. I thought you told us a minute ago it was to be on the 30th?
A. I didn't tell you exactly. I said I imagined it would be on the 30th.
Q. You imagined it would be on the 30th?
A. I supposed they kept them about two days.
Q. She died at the home of your brother in law at Option?
A. That is the post Office.
Q. How far is that?
A. About nine miles.
Q. In the state of Pennsylvania?
A. Yes, sir.

Q. You had received, at the ticket office here, a trip pass for yourself and wife from Toledo, by way of Ashtabula and Youngstown?

A. Yes, sir.

Q. Then I understand there was left, at your request, a pass on the P. & L. E. for yourself and wife, with the ticket agent at Youngstown?

A. Yes, sir.

Q. So, when you boarded the train here at Toledo, you were going as directly as you could, from Toledo to Pittsburgh, Pennsylvania?

A. Not necessarily. Directly, as close as I could, in one way, but I could not make the connections in Youngstown on that train.

Q. But the train upon which you were riding went straight through from Toledo to Pittsburgh?

A. Yes, it went straight through.

32 Q. So you could have gone through, on that train?

A. I could have, if I paid my way.

Q. You would have to pay your way from Cleveland to Youngstown?

A. To Pittsburgh, I would have to pay my way.

Q. You had to get off to get your pass?

A. I had to get off to get my pass, and walk about a mile from the New York Central to the P. & L. E. Depot.

The Court: In Cleveland?

A. In Youngstown. It may not be a mile, but it is over half a milt. It is quite a distance.

Mr. Lewis: That trip you were travelling on was entirely personal, and had no connection with your employment with the railroad company?

A. No.

The foregoing, together with the Exhibits hereto attached and made a part hereof, is all of the evidence offered and given by both parties at the trial of the above entitled cause, and is all of the evidence in this case.

And the Court, being duly advised in the premises, did, on the 2nd day of June, 1917, find in favor of the plaintiff, and assessed the amount of plaintiff's damages in the sum of $9,750.00.

And thereupon and within three days thereafter, to-wit, on the 4th day of June, 1917, the defendant, by its counsel, filed its motion in writing for a new trial of said cause on behalf of said defendant, and to set aside the verdict, as shown by the record; and the court, after due consideration of said motion did, on the 9th day of June,

33 1917, overrule said motion for a new trial and gave judgment for said plaintiff, as shown by the record, to which overruling of said defendant's motion and the giving of said judgment, defendant's counsel then and there excepted, and upon request of defendant's counsel, defendant was given forty days in which to prepare and file its bill of exceptions in said cause.

And now, on this 3rd day of July, 1917, came said defendant, by its counsel, and filed in said cause its bill of exceptions.

And the court finding that said bill of exceptions was, on the 3rd

day of July, 1917, filed by said defendant with the clerk of said court, and within the time required by law, and that forthwith, on the — day of July, 1917, notice to counsel being waived, and the same being transmitted and submitted to the trial judge on the 5th day of July, 1917, and within the time required by law for settling, allowing and signing, and the judge finding the bill of exceptions to be a true and correct bill of exceptions, and that the said bill of exceptions, together with the Exhibits thereto attached and made a part thereof, contains all of the evidence offered and given in the trial of said cause, does accordingly, on the 5th day of July, 1917, and within the time required by law, allow and sign the same, and orders that said bill of exceptions be made a part of the record in the above entitled cause, but be not spread upon the journal.

BYRON T. RITCHIE,
Judge of the Court of Common Pleas of Lucas County, Ohio, and Trial Judge.

34 EXHIBIT NO. 1.

New York Central Railroad Company,

West of Buffalo.

1916. DO 944.

Pass W. H. Mohney,
Account Engineer,
Between Collinwood—Air Line Jct.,
Toledo Division,
Until December 31, 1916. Unless otherwise ordered and subject to conditions on back. Valid when countersigned by W. F. Schaff or J. H. Turner.

D. C. MOON,
General Manager.

Countersigned
J. H. TURNER.

On Back: Not good on Main Line 6, 19, 22, 25 or 26; or 21 and 43 on Toledo Division.

Conditions.

In consideration of receiving this free pass, each of the persons named thereon, using the same voluntarily assumes all risk of accidents, and expressly agrees that the Coumpany shall not be liable under any circumstances, whether of negligence of itself, its agents or otherwise, for any injury to his or her person, or for any loss or injury to his or her property; and that as for him or her, in the use of this pass, he or she will not consider the Company as a Common Carrier, or liable to him or her as such.

35 And, as a condition precedent to the issuing and use thereof, each of the persons named on the face of this pass

states that he or she is not prohibited by law from receiving free transportation, and that the pass will be lawfully used.

If presented by any other than the person or persons named thereon, the conductor will take up this pass and collect fare.

I Agree to the Above Conditions

(Signed) W. H. MOHNEY.

To be signed in ink.

EXHIBIT No. 2.

Common Pleas Court.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, Wilbur H. Mohney, plaintiff, and The New York Central Railroad Company, defendant, that D. C. Moon, if called as a witness in this cause, would testify as follows:

1. That on March 29, 1916, and for sometime prior thereto, he was general manager of The New York Central Railroad Company, defendant herein, with headquarters and offices at the City of Cleveland, Ohio, and had general supervision and control over all lines of the defendant's railroad, extending between the cities of Cleveland, Ohio, and Toledo, Ohio, and that he, the said D. C. Moon, continued in said capacity for many months after said March 29, 1916.

36 2. That the wreck occurring on the defendant's line near Amherst, Ohio, on or about March 29, 1916, in which the plaintiff received some injuries, was due to the fact that the engineman of the second section of defendant's train No. 86 disregarded the caution signal about 8,000 feet and the stop signal about 3,000 feet in the rear of the first section of defendant's train No. 86.

It is further stipulated that the foregoing statements of the said D. C. Moon, general manager of the defendant company as aforesaid, are hereby agreed upon in lieu of the plaintiff's taking the deposition of the said D. C. Moon, and that the said statements shall be admissible in evidence on the trial of this cause, on introduction by either party hereto, subject only to objections based upon the materiality or relevancy of said statements to the issues in this action.

In Witness Whereof the parties hereto have hereunto set their hands by their attorneys, duly authorized, at Toledo, Ohio, on this 9th day of April, A. D. 1917.

WILBUR H. MOHNEY,
Per MILLER, MILLER, BRADY & SEELEY,
His Attorneys.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Per DOYLE, LEWIS, LEWIS & EMERY,
Its Attorneys.

37 EXHIBIT No. 3.

Common Pleas Court.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, on this 7th day of May, A. D. 1917, that the damages sustained by Wilbur H. Mohney, plaintiff herein, for personal injuries suffered by him on the early morning of March 29, 1916, in the wreck on The New York Central Railroad, near Amherst, Ohio, as set forth in his petition filed herein, are Ninety Seven Hundred and Fifty Dollars.

In Testimony Whereof the parties hereto have hereunto set their hands by their attorneys duly authorized.

WILBUR H. MOHNEY,
Per MILLER, MILLER, BRADY & SEELEY,
His Attorneys.
THE NEW YORK CENTRAL RAILROAD COMPANY,
Per DOYLE, LEWIS, LEWIS & EMERY,
Its Attorneys.

EXHIBIT No. 4.

Common Pleas Court.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, on this 7th day of May, A. D. 1917, that on March 29, 1916, at the time when the first section of defendant's train No. 85
38 out of Toledo, was being followed at some distance, on the same track, by the second section of defendant's train No. 86, the following rules of the company were in force and effect:

302. Normal Indication of Signals. The normal indication of interlocking signals is "Stop," except the distant, which is "Caution—Be Prepared to Stop at the Home Signal."

304. Indications are given by not more than two positions of an arm, and in addition by night lights of prescribed color.

305. The arms of home and dwarf signals have a square end, and are painted red with a white band near the end.

306. Home Signal. The arm of the home signal in the horizontal position by day, and in addition, a red light by night, indicates "Stop."

309. Distant Signal. The arm of the distant signal has a forked end and is painted yellow with a black <—shaped band near the end.

310. The arm of the distant signal in the horizontal position by day, and in addition, a green light by night, indicates "Caution—Be Prepared to Stop at the Home Signal."

312. The arm of the dwarf signal in the horizontal position by day, and in addition, a purple light by night, indicates "Stop."

325. Trains or engines must be run to, but not beyond, a signal indicating "Stop."

39 327. The clearing of any signal permits only one train or engine to pass that signal. If more than one train or engine is waiting for any signal to be cleared, any following train or engine must not proceed until the signal has been cleared after having been put to the "Stop" position behind the next preceding.

Home Signal.—A fixed signal at the point at which trains are required to stop when the route is not clear.

Dwarf Signal.—A low, fixed signal of semaphore type.

In Testimony Whereof the parties hereto have on this day hereunto set their hands by their attorneys duly authorized.

WILBUR H. MOHNEY,
Per MILLER, MILLER, BRADY & SEELEY,
His Attorneys.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Per DOYLE, LEWIS, LEWIS & EMERY,
Its Attorneys.

40 STATE OF OHIO,
Lucas County, ss:

I, William F. Renz, Clerk of the Court of Common Pleas of Lucas County, Ohio, and ex-officio Clerk of the Court of Appeals for Lucas County, Ohio, do hereby certify the foregoing to be a true and correct copy of the transcript of record and all proceedings in the said cause in the court of Appeals of Lucas County, Ohio.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Toledo, Ohio, in said County this 20th day of August, A. D. 1918.

[Seal Common Pleas Court, Lucas County, Ohio.]

WILLIAM F. RENZ, *Clerk,*
By J. KERINS, *Deputy Clerk.*

41 Certified Copy.

In the Supreme Court of Ohio.

15925.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff in Error,

vs.

WILBUR H. MOHNEY, Defendant in Error.

Motion and Brief in Support of Motion for Order Requiring Court of Appeals to Certify Record.

Doyle & Lewis, Attorneys for Plaintiff in Error.

Filed Apr. 1, 1918. Supreme Court of Ohio. Frank E. McKean, Clerk.

41*a* In the Supreme Court of Ohio.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff in Error,

vs.

WILBUR H. MOHNEY, Defendant in Error.

Motion for Order to Certify Record.

Now comes The New York Central Railroad Company, and moves this Honorable Court for an order directing the Court of Appeals of Lucas County, Ohio, to certify to this court, its record in the above entitled case #628 on the docket of said Court of Appeals, wherein The New York Central Railroad Company was plaintiff in error, and Wilbur H. Mohney was defendant in error, on the following grounds shown in said record, to-wit:

(*a*) The case is of public interest.

(*b*) The case is of great general interest.

(*c*) Error has intervened to the prejudice of plaintiff in error.

(*d*) The case involves a determination of the question whether the Federal or State decisions are controlling where a person, at the time of his injury is engaged in an interstate journey but at the time travelling upon a free pass good only between points within the State.

42 This action was originally brought in the Court of Common Pleas of Lucas County, Ohio, on the 29th day of September, 1916, by Wilbur H. Mohney to recover for personal injuries sustained by him on or about the 29th day of March, 1916, at Amherst, in the State of Ohio, while the said Mohney was riding as a passenger on one of the New York Central trains, using for such purpose an Annual Pass that had been issued to him by the Railroad Company,

entitling him to ride over the company's line of railroad between the stations of Air Line Junction, near Toledo, and Collinwood, near Cleveland, both in the State of Ohio. The said Mohney was an engineer in the employ of the said Railroad Company, but at the time of his injury, was on his way from Toledo to a point near Pittsburgh, in the State of Pennsylvania, for the purpose of attending his mother's funeral, and was not at said time, travelling in furtherance of the performance of any duty which he owed to the Railroad Company.

The Court of Common Pleas found that the plaintiff was on an interstate journey; that the transportation upon which the plaintiff was riding at the time of his injury, was issued to the plaintiff below by the Railroad Company in consideration of Mohney's acceptance of employment with said Railway Company; that the wreck occurring near Amherst, Ohio, in connection with which Mohney was injured, was occasioned by the gross negligence of the Railroad Company.

The Court of Appeals of Lucas County, Ohio, affirmed the judgment of the Court of Common Pleas, finding that the said Mohney was, at the time of his injuries, travelling upon an interstate journey; that the pass upon which he was riding at said time was issued in consideration of Mohney's employment with the said Rail-
43 road Company, and that the injury sustained by Mohney was the result of gross wanton and willful negligence on the part of said Railway Company.

On this state of facts, the questions of public interest and great general interest involved, are as follows: Do the conditions endorsed upon a pass, and accepted in writing by the person using the pass, bind the plaintiff and relieve the company from liability for injuries when such pass provides that it is free, and that the person so using it voluntarily assumes all risks of accidents and agrees that the company shall not be liable under any circumstances for any injury sustained by such persons while using such pass?

The error intervening to the prejudice of the plaintiff in error is as follows: Both the Court of Common Pleas and the Court of Appeals found that the defendant was guilty of gross negligence, the Court of Appeals finding that the conduct of the defendant was willful and wanton. These findings were made when the petition upon which the cause of action was based, alleged only that the defendant was guilty of gross negligence and carelessness. No claim was made by plaintiff that the element of willfulness or wantonness entered into the conduct of defendant.

The Federal question involved, is as follows: Under the evidence in this cause, the defendant in error, Mohney, was on his way from Toledo, Ohio, to a point near Pittsburgh, in the State of Pennsylvania, and that while riding on one of defendant's trains on a pass good between Toledo and Cleveland, both in the State of Ohio, he sustained injuries. Decisions of the Supreme Court of the United States hold that a person on an intrastate journey, travelling upon a free pass is bound by the terms endorsed upon the pass, relieving the

44 carrier from liability for injury whether due to negligence of the carrier or otherwise.

Plaintiff in error says that the decision of the Court of Appeals of Lucas County, in this cause, is contrary to the law as set forth by the Supreme Court of the United States in the case of Charleston & Western Carolina Railway Company vs. Thompson, 234 U. S., 576.

Wherefore, plaintiff in error prays this court to make an order directing the Court of Appeals of Lucas County, Ohio, to certify its record herein to this court.

DOYLE & LEWIS,
Attorneys for Plaintiff in Error.

45 In the Supreme Court of Ohio.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff in Error,

vs.

WILBUR H. MOHNEY, Defendant in Error.

Brief in Support of Motion for an Order Requiring the Court of Appeals of Lucas County to Certify its Record.

Three important questions are presented in this case:

1. Is an employee riding on personal business, using a pass and on an interstate journey, bound by the conditions endorsed on the pass and accepted by such passenger?

2. Can a judgment be based solely upon willful and wanton conduct of the defendant, when willfulness and wantonness is not pleaded or urged by the plaintiff, under circumstances where a showing of negligence only would not render the defendant liable.

3. Where a passenger was on an interstate journey, and at the time of his injury was riding upon an intrastate pass issued in accordance with both the Federal and State laws, does not
46 the fact that the journey was interstate, make the question of liability dependent on and governed by the Federal decisions?

The facts in the case at bar are:

Wilbur H. Mohney brought suit against The New York Central Railroad Company in the Court of Common Pleas of Luas County, Ohio, for injuries which he sustained while riding on one of the defendant's trains, involved in a wreck at Amherst, Ohio, on March 29th, 1916.

At the time of the injuries sustained by the plaintiff, he was an employee of the Railroad Company, but was not at the time of the accident, engaged in any work for the company, but was traveling on a pass on his way to Pittsburgh, Pennsylvania, for the purpose of attending his mother's funeral.

The case was submitted to the court, a jury having been waived, upon stipulations and the testimony of Mohney.

The plaintiff in error claims that Mohney was, at the time of his injury, on an interstate journey from Toledo to Pittsburgh, riding on a free pass, and that under the decisions of the United States Supreme

Court, the conditions agreed to and endorsed upon the back of the pass are binding. The Common Pleas Court found that these conditions were not binding, and that the defendant Railroad Company was liable for the injuries so sustained by Mohney, and this judgment was affirmed by the Court of Appeals.

Mohney, on the early morning of March 29th, 1916, boarded the defendant's train known as "First 86", at Toledo, for the purpose of going to Pittsburgh, or near Pittsburgh, to attend his mother's funeral,
and was travelling on his employee's pass, good between
47 Collinwood and Air Line Junction. At Mohney's request, transportation had been secured through the Railroad Company, over the Pittsburgh & Lake Erie Railroad, from Youngstown, Ohio, to Pittsburgh, Pennsylvania, which pass was, at Mohney's request, left at the agent's office in Youngstown. Transportation for Toledo to Youngstown had been delivered to the plaintiff, in favor of himself and his wife. Mrs. Mohney decided not to accompany Mohney on this journey and accordingly Mohney used his annual pass between Toledo and Collinwood, and expected, according to his evidence, to pay his fare from Cleveland to Youngstown, rather than ride on his transportation over the New York Central Lines by way of Ashtabula. This plan would save him some few hours' time.

The train upon which Mohney was riding, ran through from Toledo to Pittsburgh, over the New York Central to Cleveland, over the Erie to Youngstown, and over the P. & L. E. from Youngstown to Pittsburgh. It was Mohney's intention to stay on the same train until he got to Youngstown, and there get his transportation left at the agent's office, which would carry him from that point to Pittsburgh.

Mohney testified that when he reached Youngstown, he intended to get off of the train, call up his brother-in-law in Pennsylvania, get the facts about his mother's funeral, apparently not going through to Pittsburgh on this same train that he boarded at Toledo, but to wait at Youngstown, in order to catch a train that would stop at the station where his mother lived, near Pittsburgh.

In that connection, he testified on page 9 of the bill of exceptions, as follows:

"Q. When was your mother's funeral to be, Mr. Mohney?

A. I don't know a thing about it, any more than you do.

48 Q. You were on your way to attend her funeral?

A. Yes, sir.

Q. I though- you told us a minute ago it was to be on the 30th?

—. ——.

Q. So when you boarded the train here at Toledo, you were going as directly as you could from Toledo to Pittsburgh, Pa?

A. Not necessarily—directly as close as I could in one way, but I could not make the connections in Youngstown on that train."

And again on page 5, the plaintiff testifies:

Q. Where did your mother die?

A. At that place. (Meaning Option, Pa.)

Q. Where might she have been buried?

A. Our old burying-ground is up in Pennsylvania, where all the rest of them are buried.

Q. How far from that place?
A. About 150 miles north of Pittsburgh.
Q. Then there was also a graveyard near Option?
A. Near Option, where they did finally bury her.
Q. What else were you to do at Youngstown?
A. That train out of Pittsburgh, I found I could not make connections—it didn't leave there right—there are only two trains a day, a little jerk-water road and only two trains a day stop at that place, about four o'clock. I found that out before I got there; so I imagined the way I would work it, I would loaf around there, if I got the pass, visit with some of the fellows. I used to work in there on the Pea Vine, and I would rather hang around there where I knew some of them, than hang around Pittsburgh three or four hours."

The agreed statement of facts and the testimony of the plaintiff makes this clear:

(1) That the plaintiff was on his way from Toledo, Ohio, to Pittsburgh, Pennsylvania, for the purpose of attending his mother's funeral.

(2) That while on the train of the defendant company between Toledo and Cleveland, he was injured, at which time he was riding on free transportation.

49 As indicated on its face, this pass is good between Air Line Junction and Collinwood, both places within the limits of the State of Ohio.

Section 8595 of the United States Compiled Statutes, (The Hepburn Act), among other things, provides as follows:

"Nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees;"

Mohney was accordingly entitled to transportation.

Section 5 of the Interstate Commerce Act, as amended June 29th, 1906, in Section 8563 of the United States Compiled Statutes, provides:

"No common carrier subject to the provisions of this Act, shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law;" etc.

The question in this case is, was the plaintiff while on his way to Pittsburgh, and while riding on free transportation between Toledo and Cleveland, which transportation was intrastate, actually on an interstate journey?

1. As to the first question, was Mohney's pass a free pass or was it issued as a part consideration for employment?

Section 5 of the Interstate Commerce Act as amended June 29, 1906 (Section 8563, United States Compiled Statutes) provides among other things, as follows:

50 "No common carrier subject to the provisions of this Act, shall after January 1, 1907, directly or indirectly issue or give any interstate free tickets, free pass or free transportation for passengers, except to its employees and their families, its officers, agents, physicians, surgeons, attorneys at law", etc.

Section 516 of the Ohio General Code, provides among other things, as follows:

"No railroad company, owning or operating a railroad wholly or partly within this state, shall directly or indirectly, issue or give a free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians and attorneys at law."

The Federal Act (Sec. 8595) is similar to and practically identical with the Ohio Act, and is later referred to.

The pass which Mohney was using at the time of his injury had the following conditions endorsed on the back and accepted by Mohney in writing:

Conditions.

"In consideration of receiving this free pass, each of the persons named thereon, using the same, voluntarily assumes all risk of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence of itself, its agent, or otherwise, for any injury to his or her person, or for any loss or injury to his or her property, and that as for him or her, in the use of this pass, he or she will not consider the company as a common carrier, or liable to him or her as such.

And, as a condition precedent to the issuing and use thereof, each of the persons named on the face of this pass states that he or she is not prohibited by law from receiving free transportation, and that the pass will be lawfully used.

51 If presented by any other than the person or persons named thereon, the conductor will take up this pass and collect fare.

I agree to the above conditions.

(Signed) W. H. MOHNEY.

The train upon which Mohney was riding was known as the First Section of No. 86. The first section was running a short distance ahead of the second section and when near Amherst, Ohio, the engineer on the second section ran by certain block signals and collided with the rear of the first section, causing injuries for which Mohney brought suit.

In a decision of the United States Supreme Court, rendered June 22nd, 1914, in the case of Railway Company vs. Thompson, 234 U. S., 576, it is held that under the free pass provision of the Hepburn Act, a free pass issued by a railroad company between interstate points to a member of the family of an employee is gratuitous and not in consideration of services of the employee, and that the stipulations appearing on the pass, including one exempting the company from liability in case of injury, are valid.

In this case the plaintiff, Lizzie Thompson, sued the railroad company to recover for injuries sustained while she was a passenger upon a train from South Carolina to Georgia. The company pleaded that she was traveling on a free pass, that exempted it from liability. The defense was unsuccessful. The Court of Appeals held that such a stipulation was binding on a free pass, but held that the Hepburn Act created an exception, and that a so-called free pass under that act, issued to a member of an employee's family, really was not a free pass, but was issued upon consideration of the services of the employee. The Railroad Company assigned the construction of the Court of Appeals on the pass conditions as error, and Mr.
52 Justice Holmes, in delivering the opinion of the court, says, on page 577:

"The main question is whether when the statute permits the issue of a 'free pass' to its employees and their families it means what it says. The railroad was under no obligation to issue the pass. It may be doubted whether it could have entered into one, for then the services would be the consideration for the duty and the pass and by Section 6 it was forbidden to charge 'a greater or less or different compensation' for transportation of passengers from that in its published rates. The antithesis in the statute is between the reasonable charges to be shown in its schedules and the free passes which it may issue only to those specified in the act. To most of those enumerated the free pass obviously would be gratuitous in the strictest sense, and when all that may receive them are grouped in a single exception we think it plain that the statute contemplates the pass as gratuitous in the same sense to all. If follows, or rather is saying the same thing in other words, that even on the improbable speculation that the possibility of getting an occasional free pass entered into the motives of the employee in working for the road, the law did not contemplate his work as a conventional inducement for the pass but on the contrary contemplated the pass as being what it called itself, free.

As the pass was free under the statute, there is no question of the validity of its stipulations. This was conceded by the Court of Appeals, as we have stated, and is established by the decisions of this court. Northern Pacific Ry. Co. vs. Adams, 192 U. S., 440. Boering vs. Chesapeake Beach Ry. Co., 193 U. S., 442."

The Supreme Court in this case, bases its opinion upon the theory that the pass was free and gratuitous, and that in no sense of the word could one riding on such a pass be deemed a passenger for hire. As far as the case at bar is concerned, this decision in the Thompson case must forever settle the question as to whether
53 the plaintiff was riding on a free and gratuitous pass, or whether he was a passenger for hire; that is, whether the pass was given to him as part consideration for his employment.

The record in this case shows by the admission of the plaintiff himself, that he was not on company business; that the trip which he was then on, was wholly personal to himself, and in fact, the reason for the trip is given as proof of this statement, namely, that he was on his way to Pittsburgh to attend his mother's funeral.

From the plain facts here in this record, the plaintiff was on an interstate journey. He was on business wholly personal to himself, was riding on a pass that exempted the company from liability, and consequently his rights are determined by the Federal decisions. We submit that under these conditions, the plaintiff is not entitled to recover in this action, and that the ruling made by this court on the demurrer to the second defense set up in the answer, should be followed.

In a recent decision of the Supreme Court of Indiana, handed down March 28th, 1917, in the case of Ft. Wayne & Wabash Valley Traction Co. vs. Justus, 115 N. E., 585, the Supreme Court of Indiana held that a pass issued by the defendant to the deceased, an officer of another railroad in exchange for passes issued by his road to officers of defendant, as authorized by the State statutes, is a free pass or a gratuity, so that a provision therein that he should assume risk of accident is binding, preventing recovery for his death while riding thereon.

After quoting from the opinion of Justice Holmes in the Thompson case, the court then says:

"It is practically conceded by the parties to this appeal that if the pass in question was a 'free pass', or as the expression is frequently used, 'a gratuity', then the stipulation as to releasing the
54 company from liability in case of injury is valid and binding upon the parties and their representatives. It has been so held by this court and the courts of other states and of the United States. Payne vs. R. R. Co., 157 Ind., 616; N. P. R. R. vs. Adams, 192 U. S. 440."

In the case of Northern Pacific R. R. Co. vs. Adams, 192 U. S., 440, suit was brought for the purpose of recovering for the death of John H. Adams, who was on his way from Hope, Idaho, to Spokane. Adams, who was a lawyer and the attorney for several railway companies, though not in the employ of the Northern Pacific, was riding on a free pass, the conditions on which pass, provided that the company was not to be liable under any circumstances for injury to the person, or for loss or damage to the property of the passenger using said pass. Action was brought by the plaintiff, the widow and son of the deceased, in the Circuit Court of the United States, for the District of Washington. A verdict and judgment in favor of the plaintiff was sustained by the Court of Appeals, the case was taken into the United States Supreme Court on a writ of certiorari. The Supreme Court reversed the lower court and set aside the verdict, and in the court's opinion, Mr. Justice Brewer says, on page 453:

"The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted

that privilege cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby.

It follows from these considerations that there was error in the proceedings of the Circuit Court and Court of Appeals. The judgments of those courts will be reversed and the case remanded to the Circuit Court with instructions to set aside the verdict and grant a new trial."

There are numerous other decisions of the United States Courts to the same effect, but the last decision, namely, that of the Thompson case, so clearly fixes the rule that should be applied in the case at bar, that we submit that this decision in the Thompson case is controlling.

The opinion in the case of Railway against Thompson, 234 U. S., 576, would seem to conclusively establish that the pass in this case was what purports to be, free and gratuitous and not issued for a consideration.

2. The Court of Appeals bases its judgment largely if not entirely, upon their finding that the Railroad Company was guilty of wilfulness and wantonness.

Can wilfulness and wantonness be the basis of liability when not pleaded or even urged in the trial court?

The plaintiff below in his petition, alleges that:

"The engineer of the second section of said train was grossly negligent and careless in that he did not look for, see or observe the danger signals which were displayed along the line far in the rear of the train on which plaintiff was riding, and which showed that the track ahead of said second section was not clear and that to proceed along the said track would result in a collision."

No claim is made that the engineer actually saw the block signals and knowing that they were set against him, deliberately ran by them. As set forth in the petition, plaintiff below predicates liability upon the failure of the engineer "to look for, see or observe" the block signals. Under all the authorities, we submit that in order to find wilfulness or wantonness there must be some evidence either of intent or a conscious knowledge that injury would likely result from his conduct. An inadvertent failure to use due care indicates merely negligence.

White's Personal Injuries on Railroads, Section 14, reads:

"Slight negligence not being incompatible with the exercise of mere ordinary care, neither would the absence of ordinary care show willfulness, wantonness or recklessness, but to establish the absence of such care as would show willfulness or wantonness, it would seem to require more than a mere absence of ordinary care. To constitute wanton negligence it is essential that the act done or omitted must have been done or omitted with a present knowledge that injury would result therefrom, for without this conciousness the omission

would be absence of care alone. Hence, it is, that a mere inadvertent failure to observe due care indicates mere negligence, but a conscious failure to observe due care constitutes wilfulness."

Shearman & Redfield, Vol. 1, Sec. 114A, 6th Ed., reads:

"It is universally conceded that where the defendant's conduct that occasioned the injury was willful or wanton the doctrine of contributory negligence as a defense has no application. In the language of another 'when contributory negligence is relied on as a defence to an action to recover damages for personal injuries, if it be shown that they were inflicted recklessly, wantonly, or intentionally, such defense is vitiated and overcome'. The words wanton and reckless have been thought somewhat indefinite when
57 applied to this class of cases generally; but when applied to the case of injury to one whose peril was discovered by the defendant in time, with the means at hand, to avert the injury as a consequence of his own prior negligence, these terms have been universally approved.

That one may be chargeable with wanton or reckless conduct, showing a conscious indifference to the consequences to others, equivalent to will intent, he must have realized the peril to another, or that such conduct was likely or would probably place him in such danger as he could not rescue himself from. A question has sometimes been made whether the willfulness referred to relates to the act or the intention to injure; the better conclusion is that it may be either."

That it is not only necessary to plead willfulness and wantonness, but also to plead the facts indicating such willfulness or wantonness, is set forth in Railroad vs. Mitchell, 134 Alabama, 261, where the court says on page 267:

"From this review of the count, it appears that it falls short of averring wantonness or willfulness in inflicting the injury complained of; that it charges no more than that the engineer wantonly or intentionally ran said engine through said town or village of Elmore, without proper or sufficient warning or notice of the approach of said engine, and is, therefore, no more than a count for mere negligence."

Also in Railroad vs. Thrift, 140 Ill. App., 414, the court says on page 417:

"The violation of the ordinance which is the sole negligence charged, did not constitute wantonness. It is not sufficiently pleaded that appellee had knowledge, express or implied, of the presence or probable presence of appellant upon the right of way. It therefore cannot be said that under the circumstances detailed in the
58 declaration, such want of care and disregard for the rights of appellant existed as to constitute willfulness or wantonness."

Also in Sington vs. Railway, 76 So., 48, the court says in the syllabus:

"The solution of the question whether a count charges wanton or willful misconduct, or simple negligence, cannot be aided by the use of the terms 'willfully' and 'wantonly', but is measurable by the facts set forth."

See also Griffin vs. Railway, 21 O. C. C., 552 and 553.

3. The portion of Mohney's evidence above quoted, indicates beyond any doubt, that he left Toledo for Pittsburgh, or a point near Pittsburgh, for the purpose of attending his mother's funeral. He was, therefore, on an interstate journey.

The decisions of the Federal Court determine the question of liability, and the construction made by such courts, in reference to the validity of the conditions endorsed on a pass, is binding upon the State Courts.

That Mohney, as shown by the evidence, was on an interstate journey, is established by these decisions.

If the plaintiff was travelling from one state to another, notwithstanding the fact that the transportation upon which he was riding at the time of his injury was intrastate, he was, according to the authorities, on an interstate journey, and thus coming under the Federal decisions.

According to the decisions by our United States Supreme Court, it is the intent that governs and not necessarily the character of transportation that at the time was being used.

In the case of the Railroad Commission of Ohio vs. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company,
59 225 U. S., 101, the United States Supreme Court held, that coal shipped from the mines in Ohio and billed to Huron, Ohio, but intended for lake shipment, is an interstate shipment, and not a state shipment, notwithstanding the fact that the billing is from a point within the state to another point within the same state, and that a rate fixed by the Ohio Railroad Commission for coal from state points to state points, but intended for lake shipment, is a rate affecting interstate shipments under the commerce clause of the Constitution, as an attempt to regulate interstate commerce.

The syllabus reads:

"A rate fixed on that part of interstate carriage which includes the actual placing of the shipment into vessels ready to be carried beyond the State destination is, as to merchandise intended for points beyond the State, a burden in interstate commerce and beyond the power of the State to impose even if the merchandise is billed from a point within the State to the point where the vessel is."

Distinguishing Gulf, Colordo & Santa Fe Railway Co. vs. Texas, 204 U. S., 403.

"Through billing to the point beyond the State is not always necessary to determine that a shipment is interstate." Citing Southern Pacific Terminal Co. vs. Young, 219 U. S., 498.

"A rate fixed by the Ohio Railroad Commission for coal from state points to 'on board' vessels at the port of Huron, Ohio, and intended for shipment to some point beyond the State undetermined at time of shipment, and, for convenience, billed to the shippers' own order at Huron, held to be a rate affecting interstate shipment and void under the commerce clause of the Constitution as an attempt to regulate interstate commerce."

The transportation upon which Mohney was travelling, was not good outside of the State of Ohio, but was between points within the State, just as in the Worthington case, the billing was

60 from a point in the State of Ohio, to a point in the State of Ohio, and not beyond the State.

In the Worthington case, the intent was to carry this coal to points beyond Huron, Ohio, and outside of the State of Ohio, and in the case at bar, the intent of Mohney was to go from Toledo, Ohio, to Pittsburgh, in the State of Pennsylvania. In the Worthington case the billing was intrastate, but the ultimate destination was beyond the State. In the case at bar, the billing or the transportation was intrastate, but the intent was to go beyond the limits of the State of Ohio. Consequen-ly, the plaintiff in the case at bar was on an interstate journey when he was injured, just as in the Worthington case, the coal was on an interstate shipment, although the billing was intrastate. Similarly in the case of the Southern Pacific Terminal Co. vs. The Interstate Commerce Commission, 219 U. S., 498, the last paragraph of the syllabus reads as follows:

"Goods actually destined for export are necessarily in interstate, as well as in foreign, commerce, when they actually start in the course of transportation to another State or are delivered to a carrier for transportation; this is the same whether the goods are shipped on through bills of lading or on an initial bill only to the terminal within the same State where they are to be delivered to a carrier for the foreign destination."

In this case, one of the questions involved is whether the Southern Pacific Terminal Company is subject to the Act to Regulate Commerce and whether the order of the Commission relating to shipments originating both within and without the State of Texas, but intended for transshipment abroad is a regulation within the jurisdiction of the Commission. One of the defendants, Young, is a merchant engaged in buying and selling cotton seed cakes.

61 His business consists in buying cotton seed cakes in the interior, shipping it to himself by carloads at the pier at Galveston, Texas, for export.

The purchases made by Young were for export entirely, there being no consumption of these products at Galveston, and his sales to foreign countries were sometimes for immediate and sometimes for future delivery, irrespective of whether he had the product on hand at Galveston. The court says, on page 527, in reference to this situation:

"It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination. * * * The case, therefore comes under Coe vs. Errol, 116 U. S., 517, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another State, or delivered to a carrier for transportation'."

There are numerous authorities referred to in the opinions of the United States Supreme Court above referred to, which bear out the

contention that we make. As these decisions are handed down by the highest tribunal of this country, they are, of course, final. We submit that in view of the decisions of the Supreme Court, holding that through billing is not necessary in order to involve goods in interstate commerce, also is a through ticket not necessary in order to involve the passenger in an interstate journey.

In the Thompson case, supra, Mr. Justice Holmes says that if the pass is "free" or "a gratuity" then the injured passenger or his
62 representatives are bound by the stipulations as to releasing the company from liability.

Without quoting at length from the opinion in the Thompson case, we submit that the law as to liability for injuries to persons using a free pass on an interstate journey, is definitely fixed by that decision and is applicable to the case at bar.

The questions in this case are such that we submit that it is of the utmost importance that both carriers and passengers have the benefit of a final ruling by this court, and that the motion to certify the record herein should be granted.

Respectfully submitted,

DOYLE & LEWIS,
Attorneys for Plaintiff in Error.

63 *Docket Entries.*

Supreme Court of Ohio, January Term, 1918.

No. 15925.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff in Error,

vs.

WILBUR H. MOHNEY, Defendant in Error.

Action.

Motion for an order directing the Court of Appeals of Lucas County to certify its record.

Error to the Court of Appeals of Lucas County. (Const. Question Claimed.)

Attorneys for plaintiff in error: Doyle & Lewis, Toledo, Ohio.
Attorneys for defendant in error: Miller, Miller, Brady & Seeley, Toledo, Ohio.

Fees and costs:

Petition: $5.00 paid by Doyle & Lewis
Motion: 2.00 paid by Doyle & Lewis
Motion: 2.00 paid by Miller, Miller, Brady & Seeley.

Memoranda of Pleadings Filed, Writs Issued, Judgments, Orders, and Decrees.

1918.

Apr. 1. Motion for an order directing Court of Appeals to certify its record, notice and proof of service, filed.
1. Printed copies of motion and plaintiff's brief in support of motion, filed.
10. Petition in Error, waiver of summons, original papers and bill of exceptions, filed.
10. Printed Record (12) filed.
16. Defendant's printed briefs on motion to certify filed.
23. Motion for an order directing the Court of Appeals of Lucas County to certify its record—Overruled—J. 28-66.
30. Certified copy of entry sent to Clerk (Entry Held).
May 7. Motion by defendant to dismiss petition in error and acknowledgment of service filed.
7. Letter submitting motion on briefs filed.
16. Plaintiff's briefs on motion to dismiss and proof of service filed.
20. Defendant's brief on motion to dismiss and proof of service filed.
June 11. Motion by defendant to dismiss petition in error in Cause No. 15925 on the General Docket—Allowed.—J. 28-93.
18. Certified copies of entries sent to Clerk.
18. Original papers and bill of exceptions sent to Clerk.

64 *Journal Entries.*

No. 15925.

April 23, 1918.

Motion No. 9785.

THE NEW YORK CENTRAL RAILROAD COMPANY

vs.

WILBUR H. MOHNEY.

Motion for an Order Directing the Court of Appeals of Lucas County to Certify Its Record.

It is ordered by the Court that this motion be and the same hereby is, overruled.

Journal No. 28, page 66.

June 11, 1918.

Motion No. 9822.

THE NEW YORK CENTRAL RAILROAD COMPANY,
vs.
WILBUR H. MOHNEY.

Motion by Defendant to Dismiss Petition in Error in Cause No. 15925 on the General Docket.

It is ordered by the Court that this motion be and the same hereby is allowed, and that the petition in error herein be, and the same hereby is, dismissed.

It is further ordered that the defendant in error recover from the plaintiff in error his costs herein expended taxed at $—.

Journal No. 28, page 93.

STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of Ohio do hereby certify that the foregoing motion for an order directing the Court of Appeals of Lucas County to certify its record, and brief in support of same, and the foregoing printed copy of the record are true and correct copies of the motion, brief, and printed record, in Case No. 15925, The New York Central Railroad Company v. Wilbur H. Mohney, filed in my office; and that the foregoing transcript of docket and journal entries *are* truly taken and correctly copied from the Records of the Supreme Court of Ohio; and I further certify that said motion, record and transcript constitute a true and correct transcript of the proceedings in said cause in the Supreme Court of Ohio.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 8th day of August A. D. 1918.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of Supreme Court of Ohio,
By SEBA H. MILLER,
Deputy Clerk.

65 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Appeals, Lucas County, State of Ohio, Greeting:

Being informed that there is now pending before you a suit in which The New York Central Railroad Company is plaintiff in error, and Wilbur H. Mohney is defendant in error, No. 15925, which suit was removed into the said Court of Appeals by virtue of a writ of error to the Court of Common Pleas of Lucas County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the Supreme Court of the United
66 States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirty-first day of October, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

STATE OF OHIO, *ss:*

Court of Appeals for the County of Lucas.

I, William F. Renz, Clerk of the Court of Appeals, County of Lucas, State of Ohio, do hereby certify that the transcript of the record of the proceedings of this court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 5th day of November, A. D. 1918, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:

In the Court of Appeals, Lucas County, Ohio.

C. A. 628. C. P. 74018.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-Error,

vs.

WILBUR H. MOHNEY, Defendant in Error.

Stipulation.

It is hereby stipulated that the transcript already filed, in the clerk's office of the Supreme Court of the United States, with the petition for the writ of certiorari, be taken as a return to said writ, dated the 31st day of October, 1918.

JOHN H. DOYLE,
DOYLE & LEWIS,
Counsel for The New York Central Railroad Company.
ALBERT H. MILLER,
MILLER, MILLER, BRADY & SEELEY,
Counsel for Wilbur H. Mohney.

Dated the 5th day of November, 1918.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof, Witness my official seal, signature and the seal of said Court of Appeals, County of Lucas, State of Ohio, at the city of Toledo in said County this 5th day of November, A. D. 1918.

[Seal the Court of Appeals of Ohio, Lucas County.]

W. F. RENZ,
Clerk, Court of Appeals, County of Lucas, State of Ohio,
By M. E. THEUERKAUFF,
Deputy Clerk.

67 [Endorsed:] File No. 26723. Supreme Court of the United States, October Term, 1918. No. 637. The New York Central Railroad Company vs. Wilbur H. Mohney. Writ of Certiorari.

68 [Endorsed:] File No. 26723. Supreme Court U. S., October Term, 1918. Term No. 637. The New York Central Railroad Co., Petitioner, vs. Wilbur H. Mohney. Writ of certiorari and return. Filed November 7, 1918.

IN THE

Supreme Court of the United States

No. 6[illegible]196

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

WILBUR H. MOHNEY,
Respondent.

MOTION AND PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT

JOHN H. DOYLE,
HOWARD LEWIS,
Attorneys for Petitioner

Of Counsel:
DOYLE & LEWIS,
F. W. GAINES,
TOLEDO, OHIO.

IN THE

Supreme Court of the United States

No. .....

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

WILBUR H. MOHNEY,
Respondent.

MOTION FOR WRIT OF CERTIORARI.

And now comes petitioner by its attorneys and moves this Honorable Court that it, by certiorari, or by other proper process, directed to the Honorable Judges of the Court of Appeals of Lucas County, Ohio, require the said Court of Appeals aforesaid, to certify to this Honorable Court for review and determination, a certain cause lately depending in the said Court of Appeals aforesaid, wherein this petitioner was plaintiff in error and Wilbur H. Mohney was defendant in error, and to that end the said petitioner tenders herewith its petition and brief, with a certified copy of the entire record of this cause in the said Court of Appeals of Lucas County, Ohio, together with a certified copy of the record of proceedings had, looking toward a review of the same in the said Court of Appeals of Lucas County Ohio.

JOHN H. DOYLE,
HOWARD LEWIS,
Attorneys for Petitioner.

Of Counsel:
DOYLE & LEWIS,
F. W. GAINES,
TOLEDO, OHIO.

IN THE SUPREME COURT OF THE UNITED STATES.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

WILBUR H. MOHNEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully petitions for a review, by your Honorable Court, of the proceedings of the Court of Appeals of Lucas County, Ohio, in the case of The New York Central Railroad Company, plaintiff in error, against Wilbur H. Mohney, defendant in error, wherein that Court rendered a final judgment against your petitioner, and which by due process has been made final in the Courts of the State of Ohio by reason of the refusal of the Supreme Court of the State of Ohio to review the judgment of the Court of Appeals upon a motion to certify the record duly filed in the said Supreme Court of Ohio, and also by reason of the refusal of said Court to review the said judgment upon a petition in error duly filed in said Court, and for a judgment of your Honorable Court thereon.

Your petitioner, who was the defendant in the trial court and plaintiff in error in said Court of Appeals, believes that the aforesaid judgment of the said Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of the Act of Congress in such cases made and provided, for the following reasons, to-wit:

The action was one brought by the respondent, an em-

ployé of petitioner, for damages for alleged personal injuries, while traveling upon a pass on a journey from Toledo, in the State of Ohio, to Pittsburg, in the State of Pennsylvania. The pass had thereon the following conditions:

> "In consideration of receiving this free pass, each of the persons named thereon, using the same, voluntarily assumes all risk of accidents, and expressly agrees that the Company shall not be liable under any circumstances, whether of negligence of itself, its agents, or otherwise, for any injury to his or her person, or for any loss or injury to his or her property; and that as for him or her, in the use of this pass, he or she will not consider the Company as a Common Carrier, or liable to him or her as such.
>
> And, as a condition precedent to the issuing and use thereof, each of the persons named on the face of this pass stated that he or she is not prohibited by law from receiving free transportation, and that the pass will be lawfully used.
>
> If presented by any other than the person or persons named thereon, the conductor will take up this pass and collect fare.
>
> I AGREE TO THE ABOVE CONDITIONS.
>
> W. H. MOHNEY.
>
> *To be signed in ink.*"

duly signed by the respondent.

The Court of Common Pleas of Lucas County, Ohio, rendered judgment in favor of respondent and denied the motion of petitioner for a new trial. The Court of Appeals affirmed the judgment of the Court of Common Pleas.

The said Court of Appeals erred in affirming the said judgment for the following reasons:

(1) The testimony of the respondent clearly showed that he was upon an interstate journey, that he was traveling upon a pass, and that the conditions were set forth thereon as above quoted, and that the signature thereon was that of respondent.

(2) The judgment in the trial court should have been rendered for petitioner.

(3) The motion of petitioner for a new trial should have been granted for the causes therein set forth.

(4) A petition in error was duly filed in the Court of Appeals alleging the errors complained of; the Court of Appeals found that "the stipulation and the testimony * * * showed conclusively that Mohney at the time of his injury, was upon an interstate journey," but affirmed the judgment of the Court of Common Pleas.

(5) The Court failed to apply the federal rule with reference to the liability of the defendant in error, while traveling on such pass.

(6) Said judgment is repugnant to, and in conflict with, the laws of the United States, and especially the Act of Congress of the United States, approved February 4, 1887, and the acts amendatory thereof, known as the Interstate Commerce laws.

(7) Said judgment is repugnant to, and in conflict with, the Constitution of the United States, and especially Article I Section 8, Clauses 3 and 18 thereof, to-wit:

> "The Congress shall have power * * * * * * *
> Clause 3. To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.
> Clause 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or offices thereof."

(8) Said judgment is repugnant to, and in conflict with Federal legislation and the common law rules as accepted and applied, in Federal tribunals.

(9) Said judgment is repugnant to, and in conflict with the Constitution, to-wit:

Amendments, Article V:

> "* * * Nor shall any person * * * be deprived of life, liberty, or property, without due process of law."

Article XIV:

> "* * * Nor shall any State deprive any person of life, liberty, or property, without due process of law."

The aforesaid judgment is in derogation of, and against the aforesaid title, right, privilege and immunity especially set up and claimed under the aforesaid Constitution, statute and authority.

In the trial court the judgment was rendered for the respondent, that judgment was affirmed by the Court of Appeals of Lucas County, Ohio, and a motion filed in the Supreme Court of the State of Ohio, asking for an order requiring the said Court of Appeals to certify its record was denied on April 23, 1918, and a petition in error filed in the Supreme Court of the State of Ohio, for the reversal of said judgment was denied and dismissed on the 11th day of June, A. D. 1918.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Court of Appeals of Lucas County, Ohio, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and proceedings of the said Court of Appeals in the said case therein entitled The New York Central Railroad Company, Plaintiff in Error, vs. Wilbur H. Mohney, Defendant in Error, to the end that the said case may be reviewed and determined by this Honorable Court as provided by law, and that your petitioner may

have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that the said judgment of the said Court of Appeals of Lucas County, Ohio, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

JOHN H. DOYLE,
HOWARD LEWIS,
Attorneys for Petitioner.

Of Counsel:
DOYLE & LEWIS,
F. W. GAINES,
TOLEDO, OHIO.

COUNTY OF LUCAS, }
STATE OF OHIO, } s. s.

HOWARD LEWIS, being duly sworn, says that he is one of the counsel for petitioner; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

HOWARD LEWIS.

Subscribed and sworn to before me this 20th day of August, A. D. 1918.

PAUL WM. ALEXANDER,
(SEAL) *Notary Public, Lucas County, Ohio.*

BRIEF FOR PETITIONER.

The facts in this case are found in the testimony of the respondent and the stipulations of petitioner and respondent.

Respondent, at the time of his injury, was in the employ of petitioner in the capacity of a fireman. He had in his possession an annual pass entitling him to ride over petitioner's line of railroad, upon certain trains, between the stations of Air Line Junction, near Toledo, and Collinwood, near Cleveland, Ohio. He was using this pass on his journey from Toledo, Ohio, to Pittsburgh, Pa. This testimony was as follows:

> "Q. On that morning you were going to the City of Cleveland, were you? A. Yes.
>
> Q. And were you going beyond the city of Cleveland? A. Yes, sir.
>
> Q. From the city of Cleveland, what other city were you bound for? A. Pittsburgh.

The purpose of his trip was to attend his mother's funeral. It was stipulated, as follows:

> "That a trip pass was at the request of the plaintiff issued by the defendant company, providing for the transportation of the plaintiff and his wife between the city of Toledo, Ohio, and the city of Youngstown, Ohio.
>
> That at the request of the plaintiff, a trip pass in favor of the plaintiff and his wife was secured by the defendant company, and left with the agent of the defendant company at the station in Youngstown, Ohio, providing transportation of the plaintiff and his wife from Youngstown, Ohio, to Pittsburgh, Pennsylvania, over the line of the Pittsburg & Lake Erie Railroad Company."

The accident which resulted in the injury to Mohney was caused by the second section of a passenger train collid-

ing with the first section, in which Mohney was riding, near the town of Amherst, and before Mohney reached Cleveland, Ohio.

Thus, Mohney was furnished with transportation for an interstate journey, and the Court of Appeals so stated in the Court's opinion:

> "The members of the Court are unanimous in the opinion that Mohney, although riding upon a pass that was good between two stations, to-wit: Air Line Junction and Collinwood, both located in the State of Ohio, was nevertheless, at the time of his injury traveling upon an interstate journey and was not an intrastate passenger as claimed by counsel for Mohney and as found by the trial court."

It was also stipulated if the general manager was called, he would testify:

> "That the wreck occurring on the defendant's line near Amherst, Ohio, on or about March 29, 1916, in which the plaintiff received some injuries, was due to the fact that the engineman of the second section of defendant's train No. 86 disregarded the caution signal about 8000 feet and the stop signal about 3000 feet in the rear of the first section of defendant's train No. 86."

Respondent's petition alleged that the

> "engineer of said second section, with gross carelessness ran his train."

and that

> "The engineer of the second section of said train was grossly negligent and careless in that he did not look for, see or observe the danger signals which were displayed along the line far in the rear of the train on which the plaintiff was riding, and which showed that the track ahead of said second section was not clear and that to proceed along the said track would result in a collision."

Petitioner's answer says

> "that those in charge of the second section of said train were unable to, and did not see the so-called block signals, for the reason that said signals were at said time covered by a sheet of fog, so that they could not, and were not observed by the engineer in charge of said second section."

Having this defense in mind, the petitioner stipulated that the engineman of the second section of defendant's train No. 86 disregarded the caution signal, as above.

Respondent having boarded a train at Toledo, Ohio, intending to go to Pittsburgh, Pennsylvania, to attend his mother's funeral, had entered upon an interstate journey. Free passes for his transportation had been procured for him.

While these passes were each issued for a portion of the trip, and some of them were between points in the same state, the journey on which he had started was interstate.

> Railroad Company v. Sabine Tram Company, 227 U. S., 111.
>
> Syl. "Shipments of lumber on local bills of lading from one point in a State to another point in the same State destined from the beginning for export, under the circumstances of this case are foreign and not intrastate commerce."
>
> "It is the nature of the traffic and not its accidents which determine whether it is intrastate or foreign."
>
> Pgs. 126-127. "That it is the nature of the traffic and not its accidents which determines its character is illustrated by *Ohio Railroad Commission v. Worthington*, supra. A rate of 70 cents a ton was imposed by the Commission on what was called 'Lake-cargo coal' from a coal field in eastern Ohio to the ports of Huron and Cleveland, Ohio, on Lake Erie for carriage thence by lake vessels. The shipper transported the

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coal ordinarily upon bills of lading to himself, or to another for himself, at Huron, and it appeared that the coal might be accumulated in large quantities at Huron and only taken out of the accumulated lots from time to time for the purpose of shipping out of the State. The rate of 70 cents, however, covered not only the transportation of the coal to Huron, but placing it on the vessels and trimming it for its interstate journey. It was held that its transportation to Huron was an interstate carriage."

Baer Bros. v. Railroad, 233 U. S., 479.

Pg. 490. "But while there was no through-rate and no through-route there was in fact, a through shipment from St. Louis, Missouri, to Leadville, Colorado. Its interstate character could not be destroyed by ignoring the points of origin and destination, separating the rate into its component parts and by charging local rates and issuing local waybills, attempting to convert an interstate shipment into intrastate transportation."

Railway v. Louisiana R. R. Commission, 236 U. S., 157.

Pg. 163. "When freight actually starts in the course of transportation from one State to another it becomes a part of interstate commerce. The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved. And generally when this interstate character has been acquired it continues at least until the load reaches the point where the parties originally intended that the movement should finally end."

McFadden v. Railway, 241 Fed. Rep., 562.

Pgs. 565-566. "Whether commerce is interstate or intrastate must be determined by its essential character and not by mere billing or forms of contract. * * * Goods actually destined for points beyond the state of origin are necessarily in interstate commerce when

they are delivered to the carrier and start in the course of transportation to another state. * * * This is true whether the goods are shipped on through bills of lading or on initial bills only to a terminal within the same state, where they are transhipped and thereafter transported on new bills of lading to a destination beyond the state."

Ohio R. R. Commission v. Worthington, 225 U. S., 101.

Pgs. 108-109. "By every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to be such, and the rate fixed by the Commission which is in controversy here is applicable alone to coal which is thus, from the beginning to the end of its transportation, in interstate carriage, and such rate is intended to and does cover an integral part of that carriage, the transportation from the mine to the Lake Erie port, the placing upon the vessel and the trimming or distributing in the hold, if required, so that the vessel may complete such interstate carriage."

Terminal Co. v. Interstate Commerce Commission, 219 U. S., 498.

Pg. 527. "It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose. The case, therefore, comes under *Coe v. Errol*, 116 U. S., 517, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another State, or delivered to a carrier for transportation.'"

The Court of Appeals found that respondent, at the time of his injury, was traveling upon an interstate journey. The jonrney being interstate, rights and liabilities thereunder are governed by the Federal laws exclusively. *Constitution of the United States*, Article I. Sec. 8, Clauses 3 and 18:

> "The Congress shall have power * * *
>
> Clause 3. To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.
>
> Clause 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or offices thereof."

Railway v. Rankin, 241 U. S., 319.

Pg. 326. "The state courts, treating the bill of lading as properly in evidence, undertook to determine its validity and effect. We need not, therefore, consider the mooted questions of pleading. The shipment being interstate, rights and liabilities of the parties depend upon acts of Congress, the bill of lading, and common law rules as accepted and applied in Federal tribunals. *Cleveland & St. Louis Ry. v. Dettlebach*, 239 U. S., 588; *Southern Express Co. v. Byers*, 240 U. S., 612, and cases cited; *Southern Ry. v. Prescott*, 240 U.S., 632.

Railway v. Searle, 229 U. S., 156.

Pg. 158. "If the Federal statute was applicable, the state statute was excluded by reason of the supremacy of the former under the National Constitution. *Second Employers' Liability Cases*, 223 U. S., 1, 53; *Michigan Central Railroad Co. v. Vreeland*, supra."

Turnan, et al., v. Railway, 105 So. Car., 287.

Pg. 289. "In the instant case, the Federal law

must control, for the contract of carriage was interstate, and was dependent upon the Act of Congress regulating passes for employees' families."

Prigg v. Pennsylvania, 16 Pet., 539.

Pg. 617. "For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State Legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxilliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it."

Railway v. Prescott, 240 U. S., 632.

Pgs. 639-640. "As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse requirements of state legislation and decisions. And the question as to the responsibility under the bill of lading is none the less a Federal one because it must be resolved by the application of general principles of the common law."

Under the *Interstate Commerce Law*, the railroad can lawfully issue passes to certain classes of persons only. Sec. 1 (*U. S. Compiled Statutes*, Sec. 8563).

"The provisions of this Act shall apply to any corporation or persons * * * engaged in the transportation of passengers or property wholly by railroad * * * from one State or territory of the United

States * * * to any other State or territory of the United States, * * *"

"No common carrier subject to the provisions of this act shall * * * directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law * * *."

Sec. 22 (U. S. Compiled Statutes, Sec. 8595).

"* * * Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees * * *."

A pass issued by a railroad for interstate transportation to an employee must be deemed gratuitous, in view of the prohibitions in Section 2 of the *Interstate Commerce Law*, (U. S. Compiled Statutes, Sec. 8564):

Sec. 2. "That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Sec. 6 (U. S. Compiled Statutes, Sec. 8569).

"No carrier, unless otherwise provided by this Act,

shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Railway v. Rankin, 241 U.S., 319.

Pg. 327. "It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and in respect of transactions in the ordinary course of business it is entitled to the presumption of right conduct. The law 'presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemniter esse acta, donec probetur contrarium.*'"

Railway v. Maxwell, 239 U. S., 94.

"Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it."

Railway v. Thompson, 234 U. S., 576, infra.

The majority of the Court of Appeals found that the pass was issued to respondent in part consideration of his services. The dissenting view was based on the Thompson case.

A carrier may validly stipulate in a pass for interstate transportation issued to an employee that it shall not be liable for negligent injury to him.

Railroad v. Thompson, 234 U. S., 576.

Pgs. 576-7. "The plaintiff, Lizzie Thompson, sued the Railroad Company, the plaintiff in error, to recover for personal injuries inflicted upon her while she was a passenger upon a train that was carrying her from South Carolina to Georgia. The railroad pleaded that she was traveling on a free pass that exempted the company from liability, the same having been issued to her gratuitously under the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, Sec. 1, as wife of an employee. This plea was struck out subject to the defendant's exception. The defendant also asked for an instruction that if the plaintiff was traveling on a free pass providing that the railroad should not be liable for negligent injury to her person she could not recover."

Pgs. 577-8. "The main question is whether when the statute permits the issue of a 'free pass' to its employees and their families it means what it says. The railroad was under no obligation to issue the pass. It may be doubted whether it could have entered into one, for then the services would be the consideration for the duty and the pass and by Sec. 6 it was forbidden to charge 'a greater or less or different compensation' for transportation of passengers from that in its published rates. The antithesis in the statute is between the reasonable charges to be shown in its schedules and the free passes which it may issue only to those specified in the act. To most of those enumerated the free pass obviously would be gratuitous in the strictest sense, and when all that may receive them are grouped in a single exception we think it plain that the statute contemplates the pass as gratu-

itous in the same sense to all. It follows, or rather is saying the same thing in other words, that even on the improbable speculation that the possibility of getting an occasional free pass entered into the motives of the employee in working for the road, the law did not contemplate his work as a conventional inducement for the pass but on the contrary contemplated the pass as being what it called itself, free.

As the pass was free under the statute, there is no question of the validity of its stipulations. This was conceded by the Court of Appeals, as we have stated, and is established by the decisions of this court. *Northern Pacific Ry. Co. v. Adams*, 192 U. S., 440. *Boering v. Chesapeake Beach Ry. Co.*, 193 U. S., 442."

Boering v. Railway, 193 U. S., 442.

Pg. 448. "This was an action brought in the Supreme Court of the District of Columbia to recover damages for personal injuries sustained by Mrs. Boering while riding in one of the coaches of the defendant, and caused, as alleged, by the negligence of the company.

"A trial before the court and a jury resulted in a verdict and judgment for the defendant, which was affirmed by the Court of Appeals of the District, 20 D. C. App., 500, and thereupon the case was brought here on error."

Pg. 450. " 'Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not. *Squire v. New York Central Railroad*, 98 Massachusetts, 239; *Hull v. Boston, Hoosac Tunnel & Western Railroad*, 144 Massachusetts, 284; *Boston & Maine Railroad v. Chipman*, 146 Massachusetts, 107.'

"So in *Muldoon v. Seattle City Railway Company*, 10 Washington, 311, 313:

" 'We think it may be fairly held that a person receiving a ticket for free transportation is bound to see and know all of the conditions printed thereon which the carrier sees fit to lawfully impose. This is an entirely different case from that where a carrier

attempts to impose conditions upon a passenger for hire, which must, if unusual, be brought to his notice. In these cases of free passage, the carrier has a right to impose any conditions it sees fit as to time, trains, baggage, connections, and, as we have held, damages for negligence; and the recipient of such favors ought at least to take the trouble to look on both sides of the paper before he attempts to use them.'

"See also *Griswold v. New York, &c., Railroad Company*, 53 Connecticut, 371; *Illinois Central Railroad Company v. Read*, 37 Illinois, 484, 510. As was well observed by Circuit Judge Putnam in *Duncan v. Maine Central Railroad Company*, 113 Fed. Rep., 508, 514, in words quoted with approval by the Court of Appeals in this case:

" 'The result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted.'

"We see no error in the record, and the judgment of the Court of Appeals is affirmed."

The Court of Appeals, in its opinion, states:

"This Court is unanimously of the opinion that the finding of the Court of Common Pleas, that the accident in this case was the result of gross negligence on the part of the railroad company, is abundantly sustained by the evidence before the trial court. The trial judge evidently gave full credit to the testimony which it was stipulated the General Manager of the Railroad Company would give if called as a witness and by virtue of the language of that stipulation, we think the trial court might well have characterized the negligence involved in stronger terms. In fact, we are clearly of the opinion that the negligence in this case, under the evidence, was willful and wanton.

"We think the decisions throughout the country, State as well as Federal, are practically unanimous to the effect that a contract relieving the railroad com-

> pany from the results of negligence of the character which I have mentioned, are clearly against public policy and void."

Apparently, the Court felt the need of the evidence, which it styled "of the character I have mentioned," in order to sustain its finding.

The Appellate Court's opinion was the first intimation to the parties that the negligence was willful and wanton. The Court uses the word "disregarded" in the stipulation as the basis for willfulness and wantonness. There is no allegation of willfulness or wantonness in respondent's petition, and there is no testimony to this effect. The only witness was the respondent, who answered the question,

> "Now what happened as you were in the rear coach of First 86, on your way to Cleveland, that morning?"

with the words,

> "You will have to ask somebody that knows; I was asleep."

The Century dictionary defines "disregard," "v. t., To omit to regard or take notice of; overlook, specifically to treat as unworthy of regard or notice." The same authority defines "regard" as "To look upon; observe; notice with particularity; pay attention to."

When, owing to a dense fog, an engineer disregarded a signal, *i. e.*, omitted to regard it, or overlooked it, or did not look upon it, or observe it, he is not guilty of wanton or willful negligence. To arrive at the meaning of the stipulation, the Court should substitute its synonym "overlooked" for "disregarded."

Gross negligence does not mean "willful and wanton negligence," but simply "negligence."

Railroad v. Lockwood, 17 Wall, 357.

"We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform than of the amount of inattention, carelessness or stupidity which he exhibits. * * * In each case, the negligence whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate, perhaps, to call it simply 'negligence.'"

Kelley v. Mallott, 135 Fed., 74 (C. C. A.—8th Cir.).

Syl. "A characterization of defendant's negligence as gross, in a declaration, does not change the legal effect of the allegation from what it would have been, had the term 'negligence' alone been used.

Pg. 76. "The division of negligence into slight, ordinary, and gross may have originated in an endeavor, unconscious, perhaps, to justify exemplary damages where only compensative should be allowed. One who unintentionally fails in his duty, and thereby causes an injury, should make complete compensation. But to warrant punishment, there must be an actual or constructive intent to inflict the injury. Negligence and willfulness are as unmixable as oil and water. 'Willful negligence' is as self-contradictory as 'guilty innocence.'

"The substantive remains the same substantive, whatever the adjective. *Railroad Co. v. Lockwood*, 17 Wall., 357."

Thompson's Commentaries on the Law of Negligence, White's Supplement, Sec. 21.

"The term 'negligence' suggests only inadvertence, or want of ordinary care, and however great may be the degree of such want of care, so long as inadvertence remains, willfulness is excluded."

There being no willful or wanton negligence pleaded, no recovery can be had therefor, even if such had been proved.

Gentry v. U. S., 101 Fed., 51 (C. C. A.—8th Cir.).

"One may not bring a suit for one cause of action, and recover judgment for another. A Court can consider only what is in issue under the pleadings. Averments without proofs, and proofs without averments, are unavailing. The judgment may not go beyond a determination of the issues presented by the pleadings, nor beyond the scope and object of the prayers they contain. These are axioms in the law of pleading and practice. They rest upon the basic principles of one jurisprudence, that no man shall be deprived of his life, liberty and property without due process of law; and due process of law must give to the parties to be affected an opportunity to be heard respecting the justice of the judgment sought. It must be one which gives notice of the issue to be determined, which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial."

If proper pleadings had set forth a cause of action based on willfulness and wantonness, nevertheless no such act or acts were proved, the record merely showing that the engineman on the second section disregarded the signals, *i. e.*, he failed to observe them. This omission of duty, even though constituting negligence, did not amount to wantonness or willfulness.

Thompson's Commentaries on the Law of Negligence, White's Supplement, Sec. 22.

"Wanton or willful negligence is defined as such a gross want of care and regard for the rights of others as to imply a disregard of consequences or a willingness to inflict injury. The same idea is conveyed in an approved instruction to the effect that

'before a party can be said to be guilty of willful or wanton conduct, it must be shown that the person charged therewith was conscious of his conduct, and conscious from his knowledge of existing conditions that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injury.' The purpose to inflict willful injury does not exist when the result of the wrongful conduct may be reasonably attributed to mere negligence or inattention to duty."

White's Personal Injuries on Railroads, Sec. 14.

"To constitute wanton negligence it is essential that the act done or omitted must have been done or omitted with a present knowledge that injury would result therefrom, for without this consciousness the omission would be absence of care alone. Hence it is, that a mere inadvertent failure to observe due care indicates mere negligence, but a conscious failure to observe due care constitutes willfulness."

Shearman & Redfield, Vol. I, Sec. 114a, 6th Ed.

"That one may be chargeable with wanton or reckless conduct, showing a conscious indifference to the consequences to others, equivalent to will intent, he must have realized the peril to another, or that such conduct was likely or would probably place him in such danger as he could not rescue himself from."

Stewart v. Railroad Co., 32 Iowa, 561.

Pg. 563. "A willful act is an obstinate, stubborn, perverse act, and an act done willfully is one done stubbornly, by design, with a set purpose." (See also *Lee v. Rd.*, 66 Iowa, 131).

Fluckey et al. v. Southern Ry. Co., 242 Fed., 468.

"Gross and wanton negligence of a railway company, to avoid the contributory negligence of a person struck by a railway motor car, must be really willful or so highly reckless as to constitute the equivalent of willfulness."

Railway v. Miller, 149 Ind., 490.

Pg. 502. "Negligence in a case, whether it be in a degree that may be termed slight, ordinary, or gross, is nevertheless negligence still; and when willfulness is the essential element in the act or conduct of the party charged with the wrong, the case ceases to be one of negligence.

"Willfulness and negligence are the opposites of each other; the former signifying the presence of intention, and the latter its absence."

Pg. 509. "The jury, by this finding, expressly attribute the death of the deceased to the negligent act of the fireman in omiting to give any signals, and, while this act of omission on the part of the employes in control of the engine may be said to be negligence *per se*, still it was but an act of nonfeasance, and not one of aggressive character, and cannot establish the willful or intentional killing as alleged in the complaint. For, as heretofore asserted, when willfulness is the element in the act or conduct of the party charged, the case ceases to be one of negligence. There can be no middle ground between willfulness and negligence, for, as we have seen, the authorities affirm that each of these elements is the opposite of the other. Consequently, when the facts in a given case show that the injury of which the plaintiff complains is the result of the negligent act or conduct of the defendant, then the fact that such negligence may be said to be of such a degree as to be considered 'gross negligence' cannot support a charge that the injury was willful or intentionally inflicted by the party accused."

King v. Railroad, 114 Fed., 855 (C. C. A., 5th Cir.).

Syl. 2. "Where a man, just after stepping on a railroad track in the yards, was run over by part of a freight train backing at the rate of about eight miles per hour, while the conductor, who was on the rear car, was looking in the opposite direction to see if a switch was properly turned for a passing train, and none of the trainmen saw the man on the track, there was no such wanton recklessness or gross negligence as would render unavailable a plea of contributory negligence."

Fluckey et al. v. Southern Ry. Co., 242 Fed., 468 (C. C. A., 6th Cir.).

Pgs. 470, 471. "The plaintiff here does not claim any evidence tending to show an intention on the part of the motorman to injure the plaintiff nor any actual willfulness. She seeks to build up a constructive willfulness through the cumulative effect of the violation of city ordinances. One ordinance required gates or flagmen at all railroad crossings within the corporate limits; this crossing had neither. Another forbade that railroad cars should be left standing within 150 feet of the highway crossing, so that they would obstruct the view down the track; a car was standing within that distance. A third ordinance (as we assume for the purpose of this opinion), limited to six miles per hour the rate of speed of all trains or cars within the city limits; this motor car was moving at a higher speed.

* * * * * * * *

"No one claims, however, that the violation of a single ordinance is even evidence of wanton or willful negligence; and, indeed, no reason is suggested upon which such a claim could have been based.

"Plaintiff's position is that the simultaneous violation of three city ordinances indicates a degree of indifference or recklessness which should have the same effect as deliberate willfulness. We cannot think that this inference is permissible, merely from this basis

and regardless of the character of the ordinance or the nature of the violation. If the breaking of one ordinance is not of itself at all indicative of willfulness, the multiplication of such instances cannot create a basis of inference otherwise nonexistent.

"* * * in cases like the present, the intent to run over a traveler upon the highway has no connection with the intent not to observe the ordinances, and the utmost that can be established by the breach of several ordinances is a general indifference to the observance of municipal regulations. Between this inference and the other one, there is no bridge; and the case is one for the application of the arithmetical rule that the addition of nothing to nothing cannot make something.

"A review of all the cases cited by plaintiffs develops that in each one wanton or willful negligence was inferred from the character of defendant's acts, and not primarily merely from the ordinance violations; and when we turn aside from the theory that the breach of three ordinances in gross inherently tends to show wantonness, and consider the nature and effect of the breaches here involved, we get the same result. There had been no municipal determination that this particular crossing needed gates or a flagman; the ordinance was equally imperative as to every crossing in the city; and we must take notice of the vast number of such crossings within the corporation limits of every large city, where the degree of need for this precaution is not extreme."

Louisville & N. R. Co. v. Muscat & Lott, 41 So., 302.

Syl. 1. "The act of persons in charge of a railroad train in intentionally running it over a public street crossing in a city at a speed more rapidly than allowed by ordinance is not wanton or willful misconduct, unless the persons in charge had knowledge and were conscious that injury would probably result."

Railroad v. Mitchell, 134 Ala., 261.

Pg. 265. "The count alleges, that 'defendant through its servant or agent in charge of control of said locomotive engine, wantonly or intentionally caused the death of plaintiff's intestate in the manner following, viz: said servant or agent, with knowledge or notice that numerous persons were or would likely be upon the tracks of said railroad in said town or village of Elmore, and would be in great peril of their lives from the rapid running of said engine through said town or village, without proper and sufficient warning or notice of the approach of said engine, wantonly or intentionally ran said engine through said town or village with great rapidity and without proper or sufficient warning or notice of the approach of said engine, and as a proximate consequence thereof, said engine ran upon or against plaintiff's said intestate in said town or village, and so injured him that he died.'"

Pgs. 265, 266. "Stripped of all unnecessary verbiage, the wanton or intentional act set up in this count is, that the engineer 'wantonly or intentionally ran said engine through said town or village, with great rapidity and without sufficient warning, or notice of the approach of the engine,' with knowledge or notice that numerous persons were or would likely be upon the tracks of said railroad—as a proximate consequence of which wanton or intentional act of running the engine rapidly, without proper or sufficient warning, the deceased was killed. This was not an averment of an intention to injure the intestate, and, therefore, is not the equivalent of willfulness; nor is it an averment of a reckless disregard as to probable consequences, such as would make it wantonness on the part of the engineer."

Railway v. Fisk, 159 Fed., 373.

Pg. 377. "In reference to liability for injury to a trespasser, the doctrine is settled, in this jurisdiction at least, that it arises only for injuries wantonly inflicted, which involves timely discovery and willful disregard of the danger in running the trespasser

down—criminal conduct, and not negligence, in any sense of the term."

The respondent having started from Toledo, in the State of Ohio, to Pittsburgh, in the State of Pennsylvania, was upon an interstate journey. The Court of Appeals so found. At the commencement of his journey, he had been supplied with the means of traveling upon free passes from Toledo to Pittsburgh, the purpose of his journey being to attend his mother's funeral. These passes were gratuitous, but the majority of the Court of Appeals found to the contrary. That Court also "denied asserted Federal rights on a basis of fact having no support in the record."

Telegraph Co. v. Newport, 38 Supreme Court Reporter, Pg. 566.

Pg. 570. "But the question arises whether the basis of fact upon which the state court rested its decision denying the asserted Federal rights has any support in the record; for, if not, it is our duty to review and correct the error."

In conclusion, we respectfully submit that the judgment of the Court of Appeals is in derogation of, and against, your petitioner's title, right, privilege and immunity especially set up and claimed under the Constitution, Act to Regulate Commerce, and the common law rules as accepted and applied in Federal tribunals, and should be reviewed and reversed by this Honorable Court.

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NO. 196

IN THE

Supreme Court of the United States

No.....

THE NEW YORK CENTRAL RAILROAD COMPANY,

Petitioner,

vs.

WILBUR H. MOHNEY,

Respondent.

MEMORANDUM OF RESPONDENT OPPOSING MOTION AND PETITION FOR WRIT OF CERTIORARI.

ALBERT H. MILLER,
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IN THE

Supreme Court of the United States

THE NEW YORK CENTRAL RAILROAD COMPANY,

Petitioner,

vs.

WILBUR H. MOHNEY,

Respondent.

MEMORANDUM OF RESPONDENT OPPOSING MOTION AND PETITION FOR WRIT OF CERTIORARI.

I. FACTS.

This action has been before the courts for some time. How-be-it the facts are simple and the record quite brief.

Wilbur H. Mohney was a fireman on the New York Central. His run was between Air Line Junction, the division point at Toledo, Ohio, and Collinwood, the division point at Cleveland, Ohio. His work required that he should report as directed by the railroad at one division point or the other, for duty.

Shortly after he hired out to petitioner, the company issued to him an annual card pass entitling him to transportation between these two division points. Thereafter, in successive years, similar passes were issued to

him, on the last of which he was riding when injured. These passes and this pass were all of them valid between the said division points only, at either of which division points he might be called upon at any time by the railroad to report for work. Both of these division points were within the State of Ohio, on petitioner's line of railroad extending between said division points wholly and only within the State of Ohio.

This pass in question contained a clause on the back purporting to exempt the railroad from liability for injuries received by one riding on such pass.

Mohney rode on that last pass on a night train out of Toledo (Air Line Junction) quite a while ago. *The Company says* he was bound for Pittsburg. *Mohney says* he was bound for Youngstown, Ohio, and at that point was going to call up his brother-in-law in Pennsylvania and find out where and when his mother was to be buried. The mother had died a day or so before. Mohney had received word of her death, *but no word as to where and when she was to be buried.*

Between Toledo, Ohio, (Air Line Junction) and Cleveland, Ohio, (Collinwood), on the New York Central, there is a little town of Amherst, Ohio, where one of the block signals of the railroad is located. These block signals are scattered all along the line of the New York Central, and control, or are intended to control, the movement of trains.

Mohney was on the first section of train number eighty-six out of Toledo, Ohio. Another train followed a few miles back, the second section of train number eighty-six.

Mohney's train was stopped by a block signal in Amherst. Thereupon, away in the rear of this train, a mile or so back on that line of railroad, the block sig-

nals displayed warning and stop signs. But these signals meant nothing to the engineer of the second section racing up from behind. He disregarded the caution signals, the danger signals, the stop signals, plunged on with his train, crashing into the motionless first section injuring Mohney and many others.

The wreck caused quite a little commotion in railroad circles for a time, inasmuch as it was suggested by someone that perhaps the block signals had not worked properly. But this anxiety was set at rest by the investigations of the State and Interstate Commerce Commissions, and by the statement of the General Manager of The New York Central Railroad Company, which statement, in agreement with the findings of said commissions, appears in the record in this case as the evidence of the cause of the wreck. This evidence appears in the stipulation of the parties hereto, made at the initial trial of this case. The material portion of said statement of the General Manager as heretofore stipulated at the trial of this cause below, is as follows:

> "That the wreck occurring on the defendant's line near Amherst, Ohio, in which the plaintiff received some injuries, was due to the fact that the engine-man of the second section of defendant's train number eighty-six disregarded the caution signal about eight thousand feet and the stop signal about three thousand feet in the rear of the first section of defendant's train number eighty-six."

The petition alleges these facts and says that

> "* * * the defendant was grossly negligent and careless at said time in that when the train on which he was a passenger had stopped near Amherst, Ohio, the engineer of the second section was grossly negligent and careless in that he did not look for, see or observe the danger signals, which

were displayed along the line far in the rear of the train on which plaintiff was riding * * *"

"* * * that notwithstanding the fact that said danger signals were displayed, the said engineer of said second section, with gross carelessness, ran his train along the said track approaching plaintiff's train, at a high speed, notwithstanding said danger signals and contrary to the known and established rules of the defendant * * *"

"* * * the said defendant, so acting thru its engineer and servant, was grossly negligent and careless in the operation of the said second section, which was following the first section on which plaintiff was riding * * *"

"* * * that the direct and proximate cause of the said accident and of his injuries was the gross negligence and carelessness of the defendant * * *"

II. ARGUMENT.

There are three important features of this case, all of which have been passed upon the courts below, and as follows:

a. Whether or not the railroad was guilty of wanton and willful negligence in causing the wreck at Amherst. The highest court below held that it was guilty of willful and wanton negligence.

b. Whether the regular annual employee pass on which Mohney was riding was issued to him for a consideration. The highest court below held that it was based upon a consideration.

c. Whether Mohney was on an interstate or intrastate journey at the time of receiving his injuries. The highest court below held that he was on an ~~intrastate~~ interstate journey.

We will take up these three features and discuss them briefly in the above order.

(a) Wanton and Willful Negligence.

The conclusion of Mohney in his petition as to whether the company was guilty of gross negligence or of any other kind of negligence is immaterial. He alleges the facts and it is for the court to determine what those facts amount to. The highest court below in which this case has been heard, held that the acts of the railroad constituted wanton and willful negligence. Now the railroad complains and says that Mohney, by his petition, did not count on wanton and willful negligence. True, Mohney did not state his own opinion as to what kind of negligence it was. What he did was to draw and file his petition conformable with Ohio law, setting out the ultimate and operative facts. Had he plead his conclusions thereon, the same would have been improper. It was for the court to determine the degree of negligence, and the court did determine it, holding that the railroad was guilty of wanton and willful negligence.

As suggested in its brief filed in support of its motion for petition and writ of *certiorari,* the railroad plead in its answer the fact that a fog clouded these signals, but it introduced no testimony in support of that fact and we can safely assume now that no such testimony was available. At least it would not have availed much in face of the testimony of the general manager who said that the engineer of the second section *disregarded* the signals. And on the other hand it is immaterial whether this engineer disregarded these signals because they were clouded by fog, or because he didn't look for them, or because he forgot what he was doing, or for some other reason. Those signals were there to save people's lives. They were there and are there to be observed. Engineers can and must regard them.

Mohney was on that train entitled to some rights, some degree of care, whether the highest degree of care or only slight care. He got no care at all.

The defendant signaled its trains by block signals—go ahead signals, caution signals, and danger or stop signals. The engineer of the second section of train number eighty-six, following Mohney's train, ran by caution signals, ran by the danger signal, disregarded every known rule of his company, ploughing his engine through Mohney's train. Wanton negligence. Not wanton negligence? Who then *is* guilty of wanton negligence?

(b) Pass Based on Consideration.

In addition to the foregoing specific finding as to wanton and willful negligence, the courts below uniformly held that this Ohio pass issued to Mohney under Ohio law was issued to him in consideration of his employment and acceptance of employment. It was not a free pass, or issued under any provision of any Federal statute. It was good between points and on a line running wholly and only within the State of Ohio. It was issued under Ohio law.

Whether Ohio statutes forbid or do not forbid the issuance of transportation based upon such a consideration is immaterial. Railroads are required to equip with automatic couplers, yet the books are full of cases involving the violation of that law. Railroads are required to screen their engines so as to prevent the emission of sparks, yet fires occur by reason of the violation of that law.

The company took on particular liking to Mohney when it hired him, which influenced it to issue transportation to him. It didn't care to make him a present. It was not his looks or anything else that moved the railroad to issue to him that pass, excepting his acceptance of employment and employment.

(c) Interstate or Intrastate Journey.

The railroad at former trials attempted to make a showing that Mohney was ultimately bound for Pittsburgh to attend his mother's funeral. It bases this contention upon an inadvertant response of Mohney to the railroad's counsel, in answer to a question as to where at that time he was going. To that particular question Mohney answered, "Pittsburgh". We say this was an inadvertent response of Mohney. Indeed it is quite so. Mohney was not going to Pittsburgh. His mother had not lived there, she did not die there, she was not to be buried there, nor did Mohney know anybody there.

He did not know the date of the funeral, nor where his mother was to be buried. Mohney's *actual and positive intention* as shown in the record was to go to Youngstown, Ohio, and there to call up his brother-in-law in Pennsylvania on long distance to get the facts about his mother's funeral, and to visit with some of his friends at Youngstown for a few hours. Besides he intended to eventually call at a different depot at Youngstown, Ohio, and see if a pass had been left there for him entitling him to ride from Youngstown, Ohio, into Pennsylvania. This latter pass Mohney never received. It never became a contract between him and any railroad. By its provisions it would and did provide that it would not be valid until he had received it and signed his name on the back thereof under the exemption clause. He never received it and of course, never signed his name to it.

Whether or not Mohney would have gone from Youngstown, Ohio, to Pittsburgh, Pennsylvania, and from there on to that little town where his mother had died, would have depended largely, yes, altogether, upon the information received by him from his brother-in-law on long distance. This will never be known for Mohney

never got to Youngstown. But for all that, had he reached Youngstown, he might have learned from his brother-in-law on long distance that his mother was to be buried in the town where she died, in that other little town where her people had lived, or that her body had been shipped on to Toledo for burial from Mohney's home. Mohney's *present intention* was to go to Youngstown, Ohio. His *future purpose* was to be determined by the information which he expected to receive while at Youngstown, Ohio.

III. CONCLUSION.

But all this is of no great moment when we recall the circumstances of this accident and the findings of the lower courts in relation thereto, namely that the Ohio pass on which Mohney was riding was issued to him for a consideration and that in injuring him, the railroad was guilty of willful and wanton negligence. The Thompson case (*Railway vs. Thompson*, 234 U. S., 536) does not militate against the holdings of the lower courts in the case at bar. There is no case reported anywhere in the books which does militate against it.

In the Mohney case, Mohney himself was riding on transportation intrastate, from a point in Ohio to another point in Ohio.

In the Thompson case, Thompson is the employee, but it was his *wife* who was riding on the transportation, a pass, reading from a point in Georgia, to a point in South Carolina, in other words interstate.

The Mohney pass was intrastate, good between points wholly within Ohio, Air Line Junction and Collinwood, and was not and could not have been issued under the provisions of Federal law. It was issued under the laws of the State of Ohio.

The Thompson pass read from a point in Georgia, to a point in South Carolina, and was

therefore interstate, issued therefore under the Hepburn Act, or else issued in spite of the Hepburn Act.

The Mohney pass was an annual card ticket entitling Mohney to transportation as an *employee*, himself.

The Thompson pass was a trip pass.

Mohney is the one who used his annual card ticket.

Thompson's wife, to whom Thompson's company did not bear the relation of employer, was the one who used the pass in the Thompson case.

In the Mohney case, Mohney was injured through the wanton and willful negligence of the railroad.

In the Thompson case, the railroad was not guilty of wanton and willful negligence.

Had Mohney taken that Ohio pass and tried to use it between points other than between Toledo, Ohio, and Cleveland, Ohio, he would have found out mighty quick that that pass was good only between those two points. Nor could he have enlarged the scope of the pass by writing in the name of some destination different from that which was originally imprinted thereon. Neither could Mohney by any other act so change that Ohio pass as to alter its character. It was instrastate the day it was issued, and intrastate it remained.

At the time of the issuance of the employee's pass as well as at the time of the wreck, both The New York Central and Mohney were residents of the State of Ohio, the pass was issued in Ohio, it was good only between points within Ohio, Mohney used it in Ohio, he was hurt in Ohio on an Ohio railroad, and suit was brought in Ohio in Ohio courts, under the general law of negligence of Ohio.

We suggest therefore the following:—

1. The law of the forum, namely the law of Ohio, controls this case and that the exempting clause on the back of the Mohney pass is invalid.

2. That the holding of the Ohio Court invalidating the exempting clause on the back of the Mohney pass is in conformity with the holdings of the courts of the United States, and that in no event may such a clause exempt the railroad from liability on a pass issued for a consideration and for negligence, wanton and willful.

Under the facts of this case, there is and has been no error intervening prejudicial to the rights of the petitioner in this action.

All of which is

Respectfully submitted,

ALBERT H. MILLER,
A. JAY MILLER,
Attorneys for Respondent.

IN THE

UNITED STATES SUPREME COURT

IN THE OCTOBER 1919 TERM

NUMBER 196 (26723).

THE NEW YORK CENTRAL RAILROAD COMPANY,

Petitioner,

vs.

WILBUR H. MOHNEY,

Respondent.

BRIEF OF RESPONDENT.

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INDEX.

CASES CITED.

IN THE

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NUMBER 196 (26723).

THE NEW YORK CENTRAL RAILROAD COMPANY,

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vs.

WILBUR H. MOHNEY,

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BRIEF OF RESPONDENT.

(Throughout this brief, Wilbur H. Mohney, respondent and plaintiff below, is denominated plaintiff, and The New York Central Railroad Company, petitioner and defendant below, is denominated defendant.)

I.

HISTORY.

This action was instituted by Wilbur H. Mohney as plaintiff, in the Common Pleas Court of Lucas County, Ohio, against The New York Central Railroad Company as defendant, for the recovery of damages resulting from personal injuries received by the said Mohney while a passenger on one of the said defendant's passenger trains which was wrecked at Amherst, Ohio, on the defendant's line of railroad between Toledo, Ohio, and Cleveland, Ohio.

At the April 1917 term of court, trial was had, a jury waived, and a finding was made in favor of Mohney, assessing his damages at $9,750.00, as per the stipulation of the parties filed in said court to the effect that if the Court found Mohney entitled to recover, his damages were in the amount of said sum.

Judgment was thereafter entered against the railroad in said Court, and proceedings in error were instituted in the Court of Appeals of Lucas County, Ohio, on the application of the railroad, which proceedings in error resulted in the affirmance of the judgment of the Court of Common Pleas.

Thereafter the railroad filed its motion in the Supreme Court of the State of Ohio to compel the Court of Appeals to certify its record to that Court. This motion was overruled.

Later the railroad filed its petition in error in the Supreme Court of Ohio, as of right, seeking the reversal of the judgments of the courts below. On the motion of Mohney this petition in error of the railroad in the Supreme Court of the State of Ohio was dismissed.

Thereupon the railroad filed its motion and petition for writ of *certiorari* in the Supreme Court of the United States, seeking the reversal of the judgments of the courts below.

II.

STATEMENT OF THE CASE.

This action originated in an Ohio Court, having been there instituted by Wilbur H. Mohney, a citizen and resident of Ohio, against The New York Central Railroad Company, a citizen of Ohio, to recover for personal injuries sustained by the said Mohney in Ohio, while riding as a passenger on one of said railroad's passenger trains in Ohio, and on transportation good only between division points wholly within Ohio, on defendant's line of railroad extending between said division points wholly and only within the boundaries of Ohio.

On March 29, 1916, Mohney was working for the defendant as locomotive fireman. By some rule of the company he had the rank of engine man, but he had not up to that time been assigned to an engine man's run. His work was altogether that of fireman.

(Petition, Record, page 3.
Answer, Record, page 5.
Stipulation, Rec., page 10.
Mohney's Testimony, Rec., pp. 13-14.)

At the time of his injuries, Mohney was riding as a passenger on transportation some time theretofore issued to him by the defendant company, an employee's annual card pass, known in this case as pass "D O 944"

and appearing in the Bill of Exceptions and record as Exhibit I.

(Petition, Rec., p. 3.
Answer, Rec., p. 6.
Stipulation, Rec., pp. 10-11.
Mohney's Testimony, Rec., pp. 11-12.)

This pass was issued to Mohney January 1, 1916, by the defendant company and was good between Air Line Junction (Toledo), Ohio, and Collinwood (Cleveland), Ohio, division points of The New York Central Railroad Company, between which points Mohney was employed to run and did run as fireman.

(Answer, Rec., p. 6.
Stipulation, Rec., p. 10.
Mohney's Testimony, Rec., pp. 13, 15.)

Mohney was issued his first pass six months after he first hired to the defendant. The engine dispatcher, when he handed him the pass said

> "He said they all received them when they had been in the service for six months."

After that, in successive years, at the first of each year, Mohney was issued a new pass, and was riding upon the last one which he ever received, at the time of his injuries.

(Mohney's Testimony, Rec., pp. 13, 15.)

This pass on which Mohney was riding read "from Air Line Junction, Ohio, to Collinwood, Ohio," and was good on certain trains between said points. These are the division points of The New York Central Railroad

comprising the Toledo-Cleveland Division, Air Line Junction being at Toledo, and Collinwood being at Cleveland.

(Citations supra.)

This transportation, card pass D O 944, contained a clause on the back purporting to exempt the railroad from liability for injuries or property damage received or sustained by one riding on such pass.

(Answer, Rec., p. 6.
Stipulation, Rec., pp. 10-11.)

On the night he was injured, Mohney took train No. 86 out of Toledo for Cleveland. This train ran in two sections. Mohney rode in the *first* section, the rear coach. The second section followed at some distance behind.

(Petition, Rec., pp. 3-4.
Answer, Rec., pp. 5-6.
Stipulation, Rec., p. 10.
Mohney's Testimony, Rec., p. 11.)

The first section of train No. 86, in the rear coach of which Mohney was riding, came to a stop at Amherst, Ohio, in the middle of the night. This was a point between Toledo, Ohio, and Cleveland, Ohio. The engineer of the *second* section following at some distance, disregarded the caution signal displayed by means of the defendant's block system of signals, eight thousand feet in the rear of the first section of train No. 86, disregarded a stop signal three thousand feet in the rear of the first section of train No. 86, and plunged on with his train,

crashing into the first section which was ahead of him, injuring Mohney.

(Petition, Rec., pp. 3-4.
Answer, Rec., pp. 5-6.
Stipulation, Rec., p. 10.
Stipulation of D. C. Moon, Gen. Man. of N. Y. C. R. R., Rec., p. 18.)

Mohney was asleep when the wreck occurred. He first woke up in the Elyria Hospital. His injuries were severe. His skull was fractured, nose broken, and so on. $9,750.00 is agreed upon as the damage.

(Petition, Rec., pp. 4-5.
Stipulation, Rec., p. 19.
Mohney's Testimony, Rec., p. 13.)

Some showing was made that Mohney was bound for "Pittsburgh" to attend his mother's funeral, but he did not know the date of funeral, or where the funeral was to take place, or where his mother was to be buried, nor was the funeral to be held in Pittsburgh.

(Mohney's Testimony, Rec., pp. 12-13, 15-16.)

What Mohney *actually* intended to do was to ride on his Ohio pass D O 944 from Toledo to Cleveland. He intended staying on that same train as far as Youngstown. From Cleveland to Youngstown, that train ran over the Erie Railroad, and wholly within Ohio. Mohney intended leaving that train at Youngstown, and there to call up his brother-in-law, the B. & O. agent at Option, Pennsylvania, on long distance to get the facts as to his mother's funeral. Mohney used to railroad out of

Youngstown on the Pea Vine, and had a number of friends in Youngstown whom he intended to look up while there. Besides, he intended to call at a different depot in Youngstown, between one-half mile and a mile distant from the depot where he had intended to get off his New York Central train, to see if a pass had been left there entitling him to ride from Youngstown into Pennsylvania.

(Mohney's Testimony, Rec., pp. 12-13, 15-16.)

Whether or not Mohney would have gone from Youngstown to Option, Pennsylvania, would of course have depended upon the information received by him from his brother-in-law on long distance. This will never be known for Mohney never got that far. He never even got to Cleveland.

(Mohney's Testimony, Rec., p. 13.)

That part of defendant's line of railroad running from Toledo (or Air Line Junction), to Cleveland (or Collinwood), is wholly within the State of Ohio. Likewise, that part of the Erie line running from Cleveland to Youngstown is wholly within the State of Ohio. Mohney had a pass with him, or at least one had been issued for him, entitling him to ride from Toledo to Youngstown by way of Cleveland and Ashtabula, likewise wholly within the State of Ohio, but he did not use that pass, preferring rather to take the short cut on the Erie from Cleveland to Youngstown, thus avoiding Ashtabula, and paying his fare on the Erie from Cleveland to Youngstown. The pass which he used was the Ohio

pass D O 944 reading "from Air Line Junction to Collinwood", both of which points are in Ohio.

(Stipulation, Rec., p. 10.
Mohney's Testimony, Rec., pp. 12, 16.)

Mohney's annual card pass on which he was riding when injured, was issued to him for a valuable consideration, namely, employment and acceptance of employment as one of the defendant railroad company's engine men assigned to the duties of fireman, and the lower courts so specially found.

(Entry and Finding of Common Pleas Court, Record, page 9.
Entry and Finding of Court of Appeals, Record, page 3.)

The defendant railroad, in disregarding caution, danger, and stop signals, and causing the rear end collision in which Mohney received his injuries, was guilty of "gross negligence" as specially found by the Common Pleas Court, and of "gross, wanton and willful negligence" as found by the Court of Appeals.

(Entry and Finding of Common Pleas Court, Record, page 9.
Entry and Finding of Court of Appeals, Record, page 3.)

Mohney was riding on a pass, good wholly and only between points on a line of railroad which, between said points, lay altogether and entirely within the State of Ohio. Had the wreck not occurred, and had Mohney proceeded on to Youngstown where for various reasons and purposes he intended to get off that train and to

then determine the further course and destination of his journey, he still would not have been at any time outside of the confines of the State of Ohio. On this Statement of Facts, the Common Pleas Court held that Mohney was on an intra state journey. The Court of Appeals held that he was on an inter state journey.

(Common Pleas Entry and Finding, Rec., p. 9.
Court of Appeals Entry and Finding, Rec., p. 2.)

III.

PROPOSITIONS.

1. The Federal Statute, known as the Hepburn Act, is enacted under the power of Congress to regulate interstate commerce. An employee's pass good only between Air Line Junction (Toledo) Ohio, and Collinwood, (Cleveland) Ohio, issued to the employee by the railroad on whose line he runs as locomotive fireman between said points all in said State, is not issued under the provisions of the Hepburn Law, but is transportation intrastate, and issued under the provisions of the Statutes of Ohio. Therefore the terms of any purported stipulation written on the back of said transportation between points within Ohio, in a cause of action arising within the State of Ohio, are construed and enforced under and according to the law of the State of Ohio.

2. Where an employee, a locomotive fireman of a railroad, was riding on one of his employer's passenger trains as a passenger, between Toledo, Ohio, and Cleveland, Ohio, upon transportation good only between Air Line Junction, (Toledo) Ohio, and Collinwood, (Cleveland) Ohio, issued to him by his employer entitling him to ride on its line running between said points wholly within the State of Ohio, and who was injured and compelled

to give up his journey owing to a collision of trains before he reached Cleveland, Ohio, but who had intended to pay his fare on that same train but on a different line from Cleveland, Ohio, running wholly within said state, to Youngstown, Ohio, at which latter point he intended to get off that train to visit with some friends, do some telephoning, and make inquiries on the basis of which he would *then* determine the further course and ultimate destination of his journey, the law of the forum, namely the law of Ohio, controls the construction and operation of the terms of the contract of transportation on which the said employee was riding at the time he was injured.

3. For the purpose of construing and giving effect to the terms of a contract of carriage entitling a passenger to ride on a railroad train from Toledo, Ohio, to Cleveland, Ohio, on a line of railroad running between said points wholly within the State of Ohio, the determination of the fact as to whether or not said passenger who boarded said train at Toledo, Ohio, was engaged in an intrastate or interstate journey, is immaterial and unnecessary, it being shown that said passenger's contract of carriage on which he was riding at the time of the happening of the event upon which his right of action is based, is good wholly and only between points wholly within the State of Ohio and was therefore not issued under or by virtue of any provisions of the Federal Law; such contract of carriage is construed and enforced in conformity with the Law of Ohio.

4. Where the highest court of the State of Ohio, in confromity with the law of said state, finds that an annual card pass is issued to a locomotive fireman as such, by his railroad employer, for a valuable consideration, namely his employment and acceptance of employment, that finding will not be disturbed where it appears that said annual card pass is one entitling said employee to ride on certain trains of said railroad between the division points from which the said employee runs as fireman and at one or the other of which division points the said fireman is required by his

employer to report for his work, it being shown that all of the said railroad's said line between said points lies within the State of Ohio; there is no Federal question involved in such finding of the State Court.

5. A railroad company which through one of its locomotive engineers causes a rear end collision between two of its fast passenger trains, which said collision occurs by reason of the fact that the said locomotive engineer, running a passenger train which is following another passenger train at some distance, disregards and fails to heed a caution signal eight thousand feet in the rear of the forward train and a stop signal three thousand feet in the rear of the forward train, which forward train had come to a stop, is guilty of gross, wanton, and willful negligence in so causing said collision.

6. Where a locomotive fireman of a railroad company is riding as a passenger on one of his employer's passenger trains upon transportation in the form of an annual card pass issued to said locomotive fireman entitling him to ride on the said line between points wholly within the State of Ohio, and the said passenger is injured in a rear end collision occurring on said Ohio line of railroad, between the train on which he is riding and another passenger train of his employer, which rear end collision occurs by reason of the fact that one of the locomotive engine men of the defendant company in charge of one of its said trains disregards and fails to heed caution, danger and stop signals, in an action brought by said locomotive fireman against his employer to recover for personal injuries received in said collision, the railroad company may not enforce a stipulation printed upon the back of said annual card pass, purporting to exempt it from liability arising through its negligence, it appearing that in so causing said collision, the railroad, so acting through its aforesaid locomotive engine man, was guilty of gross, wanton and willful negligence, and the highest court of the State of Ohio, in which State said action was originally instituted, so found.

IV.

ARGUMENT.

Hepburn Act Does Not Apply.

The Hepburn Act (34 U. S. Stat. at Large, p 584), so often referred to by counsel for the railroad in this case, is an act passed by Congress in the exercise of the Federal Power to regulate interstate commerce. By its very terms, in Section I of said Act, we find the following language:

> "* * * * the provisions of this act shall not apply to the transportation of passengers or property * * * * wholly within one State * * * *."

Of course, the act would contain such a provision. As a matter of law, the act would have no application except to interstate commerce, whether such limitation were contained in the act or not.

The Hepburn Act does not purport to regulate intrastate commerce, and if it were an act for the regulation of intrastate commerce, it would not be upheld by the Courts.

Now the Mohney pass on which he was riding when injured, D O 944, read "From Air Line Junction, Ohio, to Collinwood, Ohio." The Hepburn Act did not touch it at all. That pass was issued to Mohney neither under the Hepburn Act nor in spite of the Hepburn Act. The Hepburn Act had nothing to do with it.

Therefore, it is quite difficult to apply Federal Court holdings on interstate transportation to the case at bar. There are and have been many passes issued under the Hepburn Law, and possibly some issued in spite of the Hepburn Law, interstate passes, reading from a point in

one state to a point in another, but that is not the case at bar. The Mohney pass is intrastate, reading from a point in Ohio to a point in Ohio. It was not interstate and can not be interstate.

But counsel for the railroad says that when Mohney took that intrastate pass and entered upon an interstate journey, then his pass became interstate. There are two things the matter with this contention:

First. Mohney did not enter upon an interstate journey. His whole trip was to be broken up at Youngstown.

Second. Even had Mohney been on an interstate journey, by no act of his either in that or in any other connection, did he or could he alter the intrastate provisions of that pass.

Mohney on Intrastate Journey.

Mohney, while in Toledo, heard of the death of his mother. He determined to take the night train, No. 86, out of Toledo. His testimony on this question is quite clear. The Bill of Exceptions is short. Mohney says:

Q. How were you to get to Youngstown? A. On that train, over the Erie.

Q. Over the Erie Railroad? What particular car do you mean you were going from Toledo to Youngstown in? A. My understanding was, that car was going on through.

(Mohney's Testimony, Rec., p. 12.)

Then later on in his direct examination, Mohney's testimony is to the following effect:

Q. Had you had any notice as to where the funeral was to be held, at that time? A. Not a particle; I didn't know where it was going to be at that time.

Q. Who was your brother in law? A. His name is Weadock.

Q. Where did he live? A. Eight or nine miles south of Pittsburgh; Option is the Post Office, but I can't remember the name of the station.

Q. He is the B. & O. agent at that station? A. He is the B. & O. agent at that station, but I can't remember the name of the station.

Q. Where did your mother die? A. At that place.

Q. Where might she have been buried? A. Our old burying ground is up in Pennsylvania, where all the rest of them are buried.

Q. How far from that place? A. About a hundred and fifty miles north of Pittsburgh.

Q. Then there was also a grave yard near Option? A. Near Option, where they did finally bury her.

Q. Going back, then, what was your intention, or what plan had you made, at Youngstown? A. Well, to call him up there, and I had arrangements made there for a pass—

THE COURT:

Where did this injury occur; between Cleveland and Youngstown?

MR. MILLER:

Between Toledo and Cleveland; Amherst.

Q. What else were you to do at Youngstown? A. That train out of Pittsburgh. I found I could not make connection—it didn't leave there right—there are only two trains a day, a little jerk water road and only two trains a day stop at that place, about four o'clock; I found that out before I got there; so I imagined the way I would work it, I would loaf around there, if I got the pass, and visit with some of the fellows. I used to work in there on the Pea Vine, and I would rather hang around there where I knew some of them than hang around Pittsburgh three or four hours.

Q. And you would call up your brother in law from there? A. Call up my brother in law; that was my intentions.

Q. What fellows do you know at Youngstown? A. All those fellows that used to work on that branch that I used to work on, that I used to work with.

Q. Did you get to Youngstown ? A. Not quite.

Q. Did you get to Cleveland? A. Not yet.

(Mohney's Testimony, Rec., pp. 12-13.)

Then later on in his testimony in the beginning of his cross examination, Mohney again touches on this subject:

Q. Where was your mother's funeral to be, Mr. Mohney? A. I don't know a thing about it, any more than you do.

Q. You were on your way to attend her funeral? A. Yes, sir.

Q. Did you know when the funeral was to occur? A. No, sir; I didn't even know the day she died.

(Mohney's Testimony, Rec., p. 15.)

It is perfectly evident from the foregoing testimony that the only intention which Mohney had upon leaving Toledo was to go to Youngstown, and there to call up his brother in law on long distance and to find out the facts as to his mother's death, the place and time of her funeral, and where she was to be buried. From these facts, he intended then at *Youngstown* to determine the future course and destination of his journey. He was not a package of freight, bundled up and put on a train with no capacity for forming an intention or changing an intention when one had once been formed. He was a human being, bound for the City of Youngstown, Ohio, on a certain railroad car which he was going to ride on that far, and that far only. At Youngstown, he intended to get off his train, get the facts from his brother in law on long distance at Option, see some of his old railroad friends there, call at another depot one-half mile or a mile distant to see if any other passes had been left there

for him entitling him to ride into Pennsylvania, and to there and at that time make up his mind as to what he should do.

Of course, Mohney never got to Youngstown. We will never know what he would have done had he reached that point. All we know is that at Youngstown he intended to call up his brother in law, see some of his old pals and inquire about other transportation.

For all Mohney knew when he left Toledo, his mother might have already been buried. She might have been buried at the place of her death, near Option, where as a matter of fact she was actually buried as is shown by Mohney's testimony (Rec., p. 13), or she might have been already buried in the old burying ground one hundred and fifty miles north of there (Rec., p. 13), or her body might have been already shipped and on its way to Toledo for burial from Mohney's home. Mohney might have learned any one of a hundred different things upon calling up his brother in law from Youngstown. He did not know what the situation was, and because of this uncertainty, he determined to call up his brother in law from Youngstown and to find out what he should do and where he should go. His present intention was to go to Youngstown. His future intention was to be determined by what he learned upon reaching Youngstown.

Counsel for the railroad say that inasmuch as Mohney's mother was buried in Pennsylvania, therefore, Mohney would have obtained that information from his brother in law on long distance from Youngstown, and would have gone on into Pennsylvania, and that for that reason Mohney was on an interstate journey. That conclusion is not fair. It loses sight of Mohney's intention and does not take into account at all the fact that upon reaching Youngstown he himself was to learn the facts upon which to base his future course. We now know,

possibly quite definitely, just what information Mohney would have received on long distance at Youngstown, but Mohney did not know then when he was on that train at the time he was hurt. That was the reason he had no present intention of going beyond Youngstown.

To further militate against this argument, counsel cite an inadvertant reply which Mohney made to one of the questions asked of him in his testimony in which he said he was going to Pittsburgh:—

> Q. On that morning you were going to the City of Cleveland, were you? A. Yes, sir.
> Q. And were you going beyond the City of Cleveland? A. Yes, sir.
> Q. From the City of Cleveland, what other city were you bound for? A. Pittsburgh.
> (Mohney's Testimony, Rec., p. 12.)

We say this was an inadvertant reply of Mohney and truly it is so, for Pittsburgh was not his destination. His mother did not live there, neither did she die there. She was not buried there and there was no intention or suggestion of burying her there. True, had Mohney at Youngstown found that the funeral was to be held at Option, Mohney would have had to pass through Pittsburgh to get to Option. But he was not bound for Pittsburgh, and had no intention of passing through Pittsburgh unless the facts which he intended learning from his brother in law on long distance at Youngstown were to require that he should go through Pittsburgh.

Mohney's testimony is fairly susceptible of but one construction, and that is that his present intention was to terminate his trip at Youngstown, and at Youngstown to then determine his future journey, whether it should be on into Pennsylvania or back to Toledo to receive his mother's body.

Mohney Pass Intrastate, Regardless of Journey.

Although it is our contention that Mohney was on an intrastate journey, from Toledo to Youngstown, where his trip was to be broken up, yet we contend that even though the contention of counsel for the railroad be sustained, and it were to be found that Mohney was on an interstate journey, that finding would have no bearing or effect upon the ultimate result of this case.

What concerns the Court in this action, is whether the exempting clause on the back of that annual card pass D O 944 is to be enforced or not. That is the point in issue, and that exempting clause on pass D O 944 appears on the back of an intrastate contract of carriage. The Ohio Law might regulate the issuance of that pass and the enforcement of its conditions, for it is a State matter, a matter of intrastate commerce, but the Federal Law regulating interstate commerce, does not and can not reach the provisions of that intrastate pass so as to uphold such exempting clause, and for many, many reasons.

Let us assume for the moment that Mohney had determined to take a trip from Toledo to New York City, using that annual card pass D O 944 from Toledo to Cleveland, and paying his fare from Cleveland on to New York City. Such an act of Mohney would not bring that pass under the operation of the provisions of the Hepburn law, any more than were Mohney to scratch out "Toledo to Cleveland" on his pass, and write in "Toledo to New York City."

If Mohney should attempt to use that pass beyond Cleveland, he would find out mighty quick that it was not good beyond that point, and that it was merely an intrastate pass. He would not only get into serious trouble by attempting to alter its destination points, but also the courts would hold that by no act of his in attempting to

write in the names of different towns on that pass, could the intrastate character of that pass be altered.

It is a contract, which may not be materially altered by one of the parties thereto.

So now we have it that Mohney could not with his own pen, change the intrastate character of that pass. And we would submit that it is likewise true that by no act of Mohney, such as has been suggested in this case, could he or did he alter the intrastate character of that pass.

It cannot be logically contended that Mohney was on anything but an intrastate journey when he was traveling on transportation entitling him to ride only from Toledo, Ohio, to Cleveland, Ohio. One glance at the facts and decision in the case of *Ry. vs. State of Arizona,* recently decided by this Court on April 14, 1919, couches this contention in much better language than we are able to put it in. The pertinant propositions of the syllabus of that case are as follows:

> (Syl.) 1. "Whether a shipment was at a given time in interstate commerce is a question of fact.
>
> 2. "The mere intention of the owner of a carnival show equipment to continue his tour beyond the state did not convert a contemplated movement of the show between two points within the state into an interstate movement so as to preclude the state from requiring that the transportation service between such points be performed by a carrier and fixing the rate chargeable by the carrier for such service.
>
> (S. Pac. R. R. vs. Stat. Ariz. Case 238, U. S. Sup. Ct., decided April 14, 1919. Reported in Lawyers' Co-op. Advance Sheets for May 15, 1919, at page 384.)

To somewhat similar effect is the case of *White vs. St. Louis R. R.*, 86 S W. (Tex. Civ. App.) 962, in which case a passenger was carried by three separate railroads from a point in Illinois to a point in Texas. She had separate transportation in the form of passes issued by the respective companies. The last railroad company carried her between points within the state. Her baggage was checked through from the point of beginning in Illinois to the point of destination in Texas. *Held*, that the last railroad company was engaged in intrastate commerce, and that the State Statute expressly prohibiting it from limiting its liability as a common carrier applied and was controlling.

White vs. St. Louis S. W. Ry. Co., 86 S. W. (Tex. Civ. App.), 962.

"To constitute interstate commerce, it must be so in fact and not only in intention."

Judson on Interstate Commerce, page 15, paragraph 1.

In the case of *Luken vs. The L. S. & M. S. Railway Company*, 248 Ill., 377, the court declared the law as follows, beginning on page 383:—

"If the places from which and to which passengers are carried, and the line over which they are carried, are within the State, then the commerce is domestic and subject to state control. The transportation between points within a state by a railroad engaged in interstate traffic does not, of itself, determine the character of the traffic and make it interstate commerce. It is not the character of the road by which the property is transported, but the character of the traffic, that determines whether or not it is interstate or intrastate commerce."

Luken vs. The L. S. & M. S. Ry. Co., 248 Ill., 377, 383.

In *Gulf C. & S. S. F. R. Co. vs. Texas,* 204 U. S., 403; 51 L. Ed., 540 (1907), the court affirmed 97 Texas, 274, in holding that the regulations of the State Railroad Commission applied to a shipment from one Texas point to another, although the shipment originally was from a point in South Dakota. The intention of the owner to forward the shipment from its original terminal point to another point in the same state did not make the shipment between the two latter points an interstate shipment. (Citing many cases.)

To similar effect are:

New Jersey Fruit Exchange vs. Central Railway Company of New Jersey, 2 Int. Com. Rep., 84.

Missouri and Illinois Railroad Tie and and Lumber Company vs. Cape Girardeau and Southwestern R. Company, 1 I. C. R., 607.

1 I. C. C. R., 30.

Hope Colton Oil Co. vs. Texas & P. R. Co., 10 I. C. R., 696.

10 I. C. C. R., 696, 703.

St. L. H. & G. Co. vs. C. B. & Q. R. Co., 11 I. C. R., 82.

State Law Regulates State Transportation.

Now this is further true. As far as the Federal law is concerned, the railroad company could have issued that Toledo to Cleveland pass to Mohney for any old consideration it saw fit As far as the Federal law is concerned, that pass could have been issued to Mohney in consideration of his services as chauffeur to the family of the superintendant of the line at Toledo. Ohio might complain, but the United States—never. And suppose it had

been issued to Mohney in consideration of his services as chauffeur to the family of the railroad superintendant, and Mohney had used that pass on a trip to New York City, riding from Toledo to Cleveland on the pass, and from Cleveland to New York City by paying his fare. Would he therefore change the intrastate character of that pass? Could the Federal Government make complaint against the railroad for issuing such a pass, which under the provisions of the Hepburn Act was unauthorized in that it was not based upon published tariffs, and prosecute the railroad upon the ground that by using such a pass on an interstate journey, the provisions of that pass thereby and thereupon became subject to conformity with Federal law? Why certainly not! The railroad's complete exoneration would lie in the fact that such a pass was intrastate, reading from Toledo to Cleveland, and that by using it in riding from Toledo to Cleveland but on an interstate journey to New York City, the passenger had not thereby altered or changed in any manner the intrastate provisions of that pass. It was intrastate the day it was issued, and intrastate it remained. And when the Ohio Courts hold that the exempting clause on the back of that pass is inoperative and void, we contend that that holding should be sustained, for the reason that it is in conformity with Ohio Law in the construction and enforcement of an Ohio contract.

Under the decisions both State and Federal, it is Ohio law which determines the enforceability of the terms of that exempting clause.

Some jurisdictions hold that the law of the place where the contract is made, is the law which governs. If that be true, the Ohio law controls, because the contract of carriage was made in Ohio.

Other jurisdictions hold that the law of the place where the contract is acted upon, is the law which con-

trols. If that be true, Ohio Law controls, because the contract was acted upon in Ohio.

Other jurisdictions hold, among which is a notable case reported in the Federal Reporter, that the law of the place of the accident controls. If that be true, Ohio Law controls, for Mohney was hurt in Ohio.

The decision in the Federal Reporter of which we speak is that of *Smith vs. Railway,* which involved the validity of the exempting clause on the back of an interstate pass reading from Wellington, Kansas to Ferry, Oklahoma, a trip pass issued by a railroad to its brakeman employee. The first proposition of the syllabus of that case is as follows:

> (Syl.) 1. "Whether a waiver of liability for injuries, printed on the back of a pass delivered to an employee, was valid, so as to constitute a defense to an action for injuries resulting from the carrier's ordinary negligence, depended on the law of the place of the accident, and not on the law of the place where the pass was delivered, since the rule that a contract will be interpreted according to the law of the place of its execution and delivery, does not apply to actions of tort."
> (Smith vs. Railway, 194 Federal, 79.)

In that case, *Smith vs. Railway, supra,* the exempting clause was void under the law of Kansas, the state wherein the pass was delivered, but was enforceable under the law of Oklahoma, the state wherein the accident occurred. The Federal Court applied the law of Oklahoma and upheld the exempting clause on the back of the pass, upon the ground that the law of the place where the accident occurred is the law which controls, and speaking through Amidon, District Judge, on page 81, the Court says:

> "If that condition was void by the law of the state where the injury occurred, it would be disregarded. If it was valid, it would be enforced."
> (Smith vs. Railroad, 194 Federal, 79, 81.)

But we do not contend alone that this exempting clause on the back of Mohney's pass is unenforceable under the law of Ohio merely, but also unenforceable under the rules laid down by the courts of Federal Jurisdiction, the authorities of which courts we will now proceed to discuss.

Mohney Pass Issued for Value.

Counsel for the railroad insist that the question as to whether or not this Mohney pass is based upon a consideration is a matter of law. If it is a matter of law, then the Ohio Courts have already ruled upon this question in conformity with Ohio Law, which Courts have held that the pass in this case is based upon a valuable consideration; but whether this question is one of law or one of fact, or of mixed law and fact, it is and has been determined by the application of the principles of common sense.

Now what was back of that annual card pass which was issued to Mohney? What was it that impelled the railroad to issue such a pass to him, providing for his transportation to and from the divisions between which he ran as fireman? For that is what we are concerned in, certainly. What we want to know is what consideration moved in the issuance of that pass.

Now, was it friendship? No. Did the railroad all of a sudden take a liking to Mohney and determine to make him a present? Hardly. Did Mohney do the railroad any particular good turn at any time which would

form the basis for a gratuity? Nothing like that has ever been mentioned.

Why, Mohney's job required that in the performance of his duty he should report at Toledo at one time and at Cleveland another. The company took no particular fancy to Mohney. It would not have issued that pass to him unless he had hired out to it. The consideration moving from Mohney was his acceptance of employment. What kept the pass alive was his employment.

But the railroad says, this won't do at all, for the Hepburn Act does not provide for transportation in consideration of service, and if his pass is issued in consideration of Mohney's employment and acceptance of employment, why it is in violation of the Hepburn Act. Well, there are two things the matter with this contention: (a) this pass reads from Toledo to Cleveland and is not, was not, and never could be issued under the provisions of the Hepburn Law, and (b) even if this pass were interstate, which it is not, the mere fact that Federal Law might prohibit its issuance based as it is upon the consideration of employment and acceptance of employment, has no bearing at all in *this* case as to whether or not the Federal Law was followed.

In support of their contention counsel for the railroad cite *Railway vs. Thompson*, 234 U. S., 576, but the pass in the Thompson case was to the *wife* of an employee and read "from a point in Georgia to a point in South Carolina". In the Thompson case the railroad bore no relation of employer to Thompson's wife.

All Passes Are Not Free Passes

The Thompson case is good law, but when this Court rendered its decision in that case, it rendered that decis-

ion upon the facts which were before it, namely, upon a pass reading from a point in Georgia to a point in South Carolina, issued not to an employee, but to the wife of an employee. This Court did not mean to hold that *all* transportation must, under the Hepburn Act, issue either gratuitously or be based upon a money consideration evidenced by published tariffs.

This is borne out by the holdings of this Court on the subject of drovers' passes.

> (Syl.) "Under the doctrine established by *Railroad Company vs. Lockwood,* 17 Wall., 357, and many cases decided since, a person traveling by railroad as a caretaker of live stock on a 'free' or 'drover's' pass is a passenger for hire as to whom a stipulation that the carrier shall not be liable for personal injuries caused by its negligence is void.
>
> (Syl.) "As applied to caretakers of live stock, §1 of the Hepburn Act of June 29, 1906, uses the term 'Free pass' in the sense which established custom had given it and judicial determination had sanctioned long before the act, viz., as meaning not a gratuitous pass but one issued for a consideration constituting the caretaker a passenger for hire, within the doctrine of the Lockwood case. *Charleston & Western Carolina Ry. Co. vs. Thompson.* 234 U. S., 576, *distinguished.*
>
> (Syl.) "Where a connecting carrier, sued for personal injuries by a person traveling on a drover's pass, based its defense on a release of liability for negligence contained in the contract of carriage issued by, and in accordance with the tariffs of, the initial carrier, under the Carmack Amendment. *Held* that it was estopped from claiming also that under its own tariff the issuance of such passes was forbidden and unlawful and that therefore such traveler was unlawfully upon its train."
>
> Railroad vs. Chatman, 244 U. S., 276.

To similar effect are the following other Federal cases:

"A contract issued to a caretaker accompanying a live stock shipment, which provided that the charge for his transportation was included in the charge for the transportation of stock, is not a 'free pass' within the Hepburn Act (Act June 29, 1906, c. 3591, §1, 34 Stat. 586) as amended by Act June 18, 1910, c. 309, §7, 36 Stat. 546 (Comp. St. 1913, (8563-5), permitting a carrier to issue a free pass to such a caretaker, and a provision therein releasing the company from liability for injuries to the caretaker caused by the carrier's negligence is invalid."

Tripp vs. M. C. R. R. Co., 238 Fed., 449.

"Where defendant railway company, in an action for personal injuries to a passenger, failed to offer evidence showing freedom from negligence, and the jury found for the plaintiff, the verdict is conclusive on the question of defendant's negligence, since an injurious accident, when the passenger exercises due care, is *prima facie* evidence of negligence by the carrier."

"Plaintiff, in an action in damages for personal injuries against a railway company, was given his transportation as a caretaker for stock on a freight train. *Held*, that he was not a gratuitous passenger, prior to the Act of June 29, 1905, c. 3591, 34 Stat. 584, 585, since this fare was a part of the consideration paid for carrying the stock, nor under that chapter, as for carrying the stock, nor under that chapter, as originally enacted or as amended by Act April 13, 1908, c. 143, 35 Stat. 60, 61, and Act June 18, 1910, c. 309, 36 Stat. 546 (Comp. St. 1913, §8563), since by that statute caretakers of stock are expressly excepted."

Wiley vs. Grand Trunk Ry., 227 Fed., 127.

It is perfectly apparent therefore, that although a drover's pass is called a "free pass" in the Hepburn Act, yet it is not a free pass insofar as its being based upon no consideration is concerned. The Courts hold that although it is termed a "free pass", it is nevertheless based upon a consideration, namely, the consideration paid on the contract of carriage of live stock or poultry, as the case may be.

The same reasoning applies to the pass in the case at bar. It was not issued under the Hepburn Act and could not have been so issued as it read from Toledo to Cleveland. But if it had been issued under the Hepburn law, or in spite of the Hepburn law, the mere fact that the Hepburn Act terms it a "free pass", does not prevent its being issued for a consideration under the law.

The Hepburn Act (34 U. S. Stat. at large, page 584) insofar as it applies to this subject, is as follows:

> Sec. 5. "* * * no common carrier subject to the provisions of this Act shall * * * issue or give any interstate free ticket or free pass, or free transportation for passengers except to its employees and their families, its officers, agents * * *; to necessary caretakers of live stock, poultry and fruit * * *."

Counsel for the railroad would have us believe that if this Mohney pass comes under the Hepburn Act, it is a free pass because the law says that it is free. In applying that contention to the facts in the case at bar, counsel forget that laws are frequently violated. There is a maxim that all are presumed to know the law, but there is no maxim that all are presumed to obey the law.

We have statutes requiring that railroads equip with automatic couplers, yet in an action to recover against a railroad by reason of its failure to obey that law, the railroad may not defend upon the ground that inasmuch

as the law requires it to equip with automatic couplers, therefore it *did* equip with automatic couplers.

We have laws requiring locomotive smoke stacks to be equipped with certain kinds of screens so as to prevent the emission of sparks, yet in an action against a railroad to recover for fires negligently caused by it, which have been due to failure to properly screen their locomotive exhausts, no railroad may defend upon the ground that inasmuch as the statute required it to equip its engines with screens therefore it *did* equip them with screens.

If the issuance of this card pass DO 944 to Mohney based on the consideration of his employment and acceptance of employment, is against the Hepburn law, we cannot help it. We contend that it is not against that law, but if it is, this would not be the first instance that the Hepburn law had been violated.

Employment Was Back of Mohney Pass

Employment was back of that Mohney pass DO 944. No other consideration was back of it. No other consideration could have been back of it.

The case of *Doyle vs. Fitchburg Railroad Company*, 166 Mass., 492, strongly supports this contention. In that case it was held that

> "A ticket, given by a railroad to an employee who lives on a line of the railroad in a place other than the place of employment, entitling him to ride from one place to another as well as traveling solely for his own pleasure or business as when going to and from work, the rate of wages paid to him being the same as that paid for the same class of work to other employees who are not furnished with such ticket, forms part of that consideration by which he is induced to enter and continue in the

employ of the corporation, and is not a mere gratuity."

Doyle vs. Fitchburg R. R. Co., 166 Mass., 492.

See also:

Gill vs. Erie Ry. Co., 135 N. Y. Supp., 355. 151 App. Div., 131.

The following cases are of similar import:

Whitney vs. Railroad, 102 Fed., 850.

"Plaintiff, being in the employment of the defendant, a railroad company, changed to a different employment, still with defendant, and, in connection with the change, stipulated for free transportation to Boston from the city where he was to be employed, not in connection with his work, but for his own convenience. On one of these trips, made for his own purposes, and while not at work or going to or from his work, he was injured by the derailing of the car in which he was riding. He was traveling on a pass, similar to others which had been previously issued to him, stamped as an employe's pass, and containing on the back a waiver of all claims against the defendant arising from the negligence of its agents or otherwise. *Held*, that plaintiff was a passenger, and that an action to recover for the injury was governed by the rules applicable as between carrier and passenger, and not by those applicable as between master and servant, and the stipulations relieving the defendant from liability for negligence will not be enforced against the plaintiff although, he voluntarily assented to them."

Whitney vs. Railroad, 102 Fed., 850.

Dugan vs. Blue Hill Railway, 193 Mass., 431; 79 N. E., 748.

"In an action against the street railway company for personal injuries incurred by a motorman in the employ of defendant while being carried on a car of the defendant upon an errand of his own

after his day's work was done, it appeared that the plaintiff was traveling on a pass by the terms of which he assumed all risk of accident * * *. * * * In charging the jury, the judge ruled that * * * the plaintiff was a passenger for hire * * *. *Held*, * * * the defendant's exception to the ruling that the plaintiff was a passenger for hire must be overruled, as on the question of fact this court could not say that the judge came to the wrong conclusion * * *."

See also, Walther vs. So. Pac., 159 Cal., 769; 116 Pac., 51.

Eberts vs. Railroad, 151 Mich., 260.

Harris vs. Puget Sound Railroad, 52 Wash., 289; 100 Pac., 838.

(Syl.) 2. "The giving plaintiff a free pass did not alter the nature of the transaction. He was not estopped from showing that he was not to take his passage upon the terms therein expressed."

Ry. vs. Stevens, 95 U. S., 655.

(Syl.) 5. "Under evidence showing that a street car company regularly furnished its servants with passes to and from their work, it must be presumed that the pass given to decedent was given as a part of his wages, and not a free pass, hence a stipulation thereon exempting the company from liability for its negligence was void."

Ind. Tr. Co. vs. Isgrig, 181 Ind., 211.

Later on, the Court speaking through Mr. Justice Erwin in the opinion on page 216, has this to say:

"The employment of the conductor, the labor performed, the payment of wages, the issuing of the pass for transportation to and from his home are all an entirety, and as inseparable as the transaction in relation to the stock driver's pass. In our opinion, the appellee's decedent was not riding on a free pass."

Ind. Tr. Co. vs. Isgrig, 181 Ind., 211, 216.

(Syl.) "The rule that, where a pass is issued to an employee as one of the terms of his employment, the clause assuming the risk of accident is not binding, is not changed by St. 1913, c. 784, §18 as amended by St. 1914, c. 679, §2, prohibiting free transportation but permitting free or reduced rate service to employees, etc., and St. 1913, c. 784, §20, requiring filing of rate schedules."

Palmer vs. R. R., 116 N. E. (Supreme Judicial Court Mass.), 899.

Now as against the authorities cited by Mohney in support of his contention that the exempting clause on the back of that Ohio pass is inoperative, counsel for the railroad rely upon the Thompson case (*Railway vs. Thompson,* 234 U. S., 576), but the Thompson case is not in point:

In the Mohney case, Mohney is the employee and he it is who uses the transportation.

In the Thompson case, Thompson is the employee, but his *wife* it is who rides upon the transportation.

In the Mohney case, the Mohney transportation was intrastate, from Toledo, Ohio, to Cleveland, Ohio.

In the Thompson case, the transportation was interstate, from a point in Georgia to a point in South Carolina.

The Mohney pass being intrastate, was not and could not have been issued under any provision of Federal Law.

The Thompson pass being interstate was issued therefore under the Federal Law.

The Mohney pass was an anual card ticket entitling Mohney to transportation as an employee, himself.

The Thompson pass was a trip pass and was not to an employee.

Mohney is the one who used his annual card ticket.

Thompson's wife, to whom the railroad company did not bear the relation of employer, was the one who used the pass in that case.

Mohney counts on gross negligence and the facts proven bear him out.

The Thompson case does not involve anything except ordinary negligence.

The theory of the Supreme Court, in deciding the Thompson case, is that an interstate trip pass, reading from a point in one state to a point in another state, issued and used as Thompson's wife used that pass, is a gratuity *under the Hepburn Act,* not being issued to an employee himself. Whereupon the Court upholds the validity of the exempting clause on the back of that trip pass which Thompson's wife used.

But this is not the Mohney case at all. The high authority of the Thompson case is not subject to diversion at the hands of counsel for the railroad in the case at bar, so that that high authority stands sponsor for absolving the defendant railroad from liability for its gross negligence in causing the wreck which injured Mohney.

Mohney Entitled to Some Degree of Care.

Mohney was on that train, entitled to some rights, some degree of care, whether the highest degree of care or only slight care. He got no care at all. Absolutely nothing was done for his safety, and that which was done, was done with the most extreme kind of recklessness and wantonness.

A question somewhat similar to the one involved in this Mohney case came up before this Court in the case of *Railroad vs. Maucher,* decided January 7, 1919, and re-

ported in the Lawyer Co-op., U. S. Supreme Court Advance Opinions under date of February 1, 1919, which case involved the right of a circus employee to recover against a railroad for injuries received in a collision of trains between the circus train on which the plaintiff was riding and another train on the railroad's line. In his contract of employment the circus employee had agreed to release all railroad companies from any claims for injuries suffered while traveling with the circus on their lines. Suit was brought by Maucher in the State Court of Nebraska, to recover for injuries received by him while riding on the circus train, in which action Maucher was successful. In affirming the judgment rendered in the State Court of Nebraska, this Court, speaking through Mr. Justice Brandeis, has this to say:

> "Furthermore, plaintiff was not even a passenger on the railroad. His claim rests not upon a contract of carriage, but upon the general right of a human being not to be injured by the negligence of another."
>
> (Chicago, R. I. & Pac. Ry. vs. Maucher, decided Jan. 7, 1919, reported in Lawyers' Co-op., U. S. Sup. Court Adv. Ops. for Feb. 1, 1919, at page 122.)

On this same subject we would quote similar language of another court, in the case of *Railroad vs. Pitcock*, 82 Ark., 441, as follows:

> "They (railroads) can not buy immunity from liability for a failure to discharge it, by reduced fare or free transportation. * * * the question is one of public duty, which the state as *parens patriae*, having due regard for the lives and limbs of all her subjects, will not permit to be relegated to the domain of private contract. The interest which the commonwealth has in the comfort and safety of her citizens, to see that they are protected from injuries resulting through the negligence of

the public carrier or its servants, is the same, whether such citizen be a gratuitous passenger or a passenger for hire."

(Railway vs. Pitcock, 82 Ark., 441; 118 A. M. St. Rep., 84.)

Gross, Wanton, and Willful Negligence.

The accident in this case occurred by reason of the fact that the defendant's engine man in charge of the second section of train #86 "disregarded" the block signals. Now when we say disregarded, we mean exactly that same thing. He disregarded those block signals. It isn't our language. It is the language of D. C. Moon himself, the General Manager of The New York Central Railroad Company, with offices at Cleveland. It was Moon who published a statement relative to the cause of the accident, and in which statement Moon says that the accident was occasioned by reason of the fact that the engine man of the second section "disregarded" the signals.

Stipulation, Record, page 18.

General Manager Moon is a man of no mean intellectual attainments. He knows what the word "disregard" means. So does this Court. It means that that engineer failed to give heed to the caution, danger and stop signals that were set against him, contrary to the known and established rules of the company for care and safety, on which the very foundation stone of its existence rests. That engineer, unmindful of the rules of his company, without thought as to the lives of others, disregarding caution, danger and stop signals, plunged on with his train, ran down the motionless first section and ploughed clear through the rear coach in which Mohney was riding. Gross negligence. Not gross negligence? Who then *is* guilty of gross negligence!

Defense of Fog Abandoned Below.

The railroad makes a feeble effort in its argument before this Court, to attempt to show that when General Manager Moon says "disregarded" the signals, he had in mind that the signals were covered by a sheet of fog and that the engineer could not observe them. This defense is alleged in the answer of the defendant, 'tis true. One can find that defense by looking up the answer. It is alleged surely enough. But that defense is not only not sustained by the evidence, but it is not sustained by any evidence of any kind, of any sort, at any place, at any time. The railroad introduced not one minute scintilla of evidence on that subject, not a syllable, not even a letter of a word which related to fog or anything of the sort. The railroad knew what caused the accident. It got its information from Moon, the General Manager, and Moon knew that the engineer disregarded the signals.

Therefore, we would suggest that the railroad's argument built up on the supposed fact that the signals were covered by a fog, is entitled to no weight unless some evidence of some kind can be found in the record relating to that subject. And there is no such evidence.

Degree of Negligence for Court to Find.

Now Mohney in his petition charged "gross negligence", "gross negligence and carelessness", and the like, *pleading* in conformity with Ohio law, the facts upon which his conclusions were based. Under the law, the facts control. Mohney's conclusions as to what these facts amount to, are of no avail. It is and was for the Court to find whether the company was guilty of ordinary negligence, or such gross negligence as amounted to wanton and willful negligence. Mohney pleaded the facts,

the disregarding of the signals contrary to the known and established rules of the company, all when the offending engineer *knew that his actions would result in a collision and an injury to passengers.* The railroad had knowledge of these facts, through the petition, and the Court has stated what these facts have amounted to.

We submit therefore that we have not counted on one cause of action and taken judgment on another. We have pleaded the facts, and have taken judgment on those facts.

We come now then, to the question of the validity of the exempting clause on the back of that Mohney pass.

Exempting Clause Invalid in Ohio.

In Ohio, a stipulation such as appears on the back of that Mohney pass, exempting a railroad from liability, caused by the negligence of itself or its employees, when such contract is made and enforced within the State, is absolutely void.

This proposition is undisputed, and it would be an idle expenditure of time to set out at length all the cases in support thereof.

From a very strong recent Ohio Supreme Court case on this subject, we quote the following from the opinion by Mr. Justice Wanamaker on page 71 of the report:

> "Why should a court recognize in any person, artificial or natural, the right to do a wrong to some other person? How can it be said to be the right of one person, whether by contract or otherwise, to take the life or limb of another person wrongfully and negligently, and wholly without liability or responsibility for such wrongful and negligent act?
>
> If a contract between employer and employee, whereby the employee assumes all risks no matter how negligent the employer may be, must be

upheld by courts as a valid contract, the enormous increase in industrial casualties, the loss of life and limb that would suddenly and inevitably follow, would be almost inconceivable. We would have a veritable army of crippled unfortunates and maimed dependents, deprived of life's joys and blessings, filling our almshouses as paupers and charges upon the state's financial resources, entailing a burdensome system of taxation. Wholly apart from the higher humanitarian questions involved, the increased burden thus placed upon the state for charitable purposes would be, in and of itself, sufficient to affect contracts of this character with a vital public interest. Courts should not hesitate to hold such contracts wholly null and void.

Therefore, upon the general fundamental principles of public policy upon which the Ohio Constition and its laws are founded, as well as from the spirit of many of our constitutional principles, such a policy as is contained in the Pullman Company contract in the case at bar is clearly in conflict with the sound and humane policy of the state."

P. C. C. & St. L. Ry. Co. vs. Kinney, 95 O. S., 64, 71-72.

The syllabus of this case relating to this subject, is as follows:

(Syl.) 1. "Liberty of contract is not an absolute and unlimited right, but upon the contrary is always subservient to the public welfare.

(Syl.) 2. "The public welfare is safeguarded not only by constitutions, statutes and judicial decisions, but by sound and substantial publiv policies underlying all of them.

(Syl. 3. "A contract between an employer and employee, which nullifies or lessens any legal duty, that the employer owes to the employee relative to safeguarding the life, limb, safety, health or welfare of the latter, is contrary to public policy, and therefore, null and void. * * *"

Ry. vs. Kinney, 95 O. S., 64.

"It is well settled, in Ohio at least, that a common carrier cannot by any stipulation in his contract, or by any notice to the other party, exempt himself for negligence or default of himself or agent."

C. H. & D. Ry. vs. Pontius, 19 O. S., 221, 235.

See also:

R. R. Co. vs. Shepperd, 56 O. S., 68.
Ry. vs. Curran, 19 O. S., 1.
Knowlton vs. Ry., 19 O. S., 260, 263.

Exempting Clause Invalid in Other States.

"A clause in a railroad pass exempting the company from liability for injury to an employe to whom a pass is delivered in pursuance of a contract of employment is against public policy, and void."

Gill vs. Erie R. R. Co., 135 N. Y. Supp., 355.

But even in jurisdictions wherein such a contract is held valid, to exempt a carrier from liability for ordinary negligence, it is generally held that the carrier will not be relieved from liability for gross negligence, or for wantonness or for willfulness. The cases of some of these jurisdictions are typified by the following authorities:

(Syl.) 1. "A passenger traveling upon the cars of a railroad upon a free pass, on the back of which is endorsed a printed contract to the effect that the passenger assumes all risks of accidents * * * is deemed to have assented to the endorsement as a contract, by the act or using of said pass as a ticket, and is bound by its terms, properly construed and so far as they do not conflict with rules of public policy.

(Syl.) 3. "Such an agreement exempts the company from liability for damages resulting from

a slight or ordinary negligence of its servants, and leaves it liable only for gross negligence, willful misfeasance or act which have the character of recklessness. Settled rules of public policy forbid them to exempt themselves by contract from liability for these faults."

Ry. vs. Read, 37 Ill., 484.

(Syl.) 2. "A person riding upon a free pass may recover for personal injuries received through the gross negligence of the company.

(Syl.) 3. "Gross negligence is defined to be the want of slight diligence or care."

R. R. vs. O'Keefe, 63 Ill. App., 102.

To the same affect is,

Ry. vs. Beggs, 85 Ill., 80.

(Syl.) "Where a person traveling on a railroad receives from the company a free pass upon which is endorsed a statement that, 'it is agreed that the person accepting this ticket assumes all risk of personal injury * * *', such endorsement or agreement does not cast upon such person any risks arising from the gross negligence of the servants of the railroad company in running the train; * * *"

Ry. vs. Mundy, 21 Ind., 48.

To the same affect are,

Meuer vs. Ry., 5 S. D., 568.

Walther vs. Ry., 159 Calif., 769.

Turman vs. Ry., 86 S. E. (Supreme Court South Carolina), 655.

Annas vs. Ry., 67 Wisc., 46.

Ohio Law Controls.

Since Mohney was traveling on an intrastate pass which was issued to him in Ohio, used by him in Ohio, and while riding on which he was injured in Ohio, the Ohio law controls the construction, operation and enforcement of that contract of carriage.

The Hepburn Act does not control, nor does the Hepburn Act bring the Mohney contract within the operation of the Federal law, for by its very terms the Hepburn Act provides as follows:

> Sec. 1. "* * * the provisions of this Act shall not apply to the transportation of passengers * * * wholly within one state * * *". (Hepburn Act, 34 U. S. Statute at large, 584).

It follows therefore, that inasmuch as the terms of the transportation agreement depend upon local law, this exempting clause must stand or fall with the Ohio decisions.

And in this connection it is not necessary to go into the question as to whether the law of the place where the contract is made, is the law which controls, or whether the law of the place of the accident is the law which controls. In the case at bar, the contract was made in Ohio, and Mohney was hurt in Ohio.

In passing however, we will quote the syllabus in *Smith vs. Railway,* 194 Fed., 79, in which action there was involved the validity of the exempting clause on the back of an interstate employee's pass reading from Wilmington, Kansas, to Ferry, Oklahoma. It appeared that such exempting clauses were invalid under the law of the State of Kansas, wherein the contract of carriage was made, but were valid in the State of Oklahoma, wherein the employee was injured. The pass was a trip pass.

The following is the language:

> (Syl.) 1. "Whether a waiver of liability for injuries, printed on the back of a pass delivered to an employee, was valid, so as to constitute a defense to an action for injuries resulting from the carrier's ordinary negligence, depended on the law of the place of the accident, and not on the law of the place where the pass was delivered, since the rule that a contract will be interpreted according to the law of the place of its execution and delivery does not apply to actions of tort."

Then later on, at page 81, the Court, speaking through District Judge Amidon, has this to say:

> "If that condition was void by the law of the State where the injury occurred, it would be disregarded. If it was valid, it would be enforced."
>
> Smith vs. Railway, 194 Fed., 79, 81.

The Ohio Supreme Court follows the rule that the validity of the exempting clause must be determined by the laws of the State wherein the contract is made and to be executed.

> Knowlton vs. Ry., 19 O. S., 260.
>
> Ry. vs. Shepperd, 56 O. S., 68.

See also,

> Hughes vs. Penn. R. R., 202 Pa., 222, likewise reported in 63 L. R. A., 513, wherein appear extensive notes and annotations on page 527 (63 L. R. A.).

Exempting Clause Invalid in Federal Courts.

In the case of *Southern Pacific Company vs. Schuyler*, 227 U. S., 601; 57 Law Ed., 662, in which the plaintiff was riding gratuitously from one state to another, while off duty, the Court held as follows:

(Syl.) "An employee in the railway mail service who, in good faith and with the consent of the carrier, accepts when off duty a free passage in interstate transportation, does not forfeit his right to the benefit of the rule of the local law, which charges a carrier with the duty to exercise care for the safety of a gratuitous passenger because his gratuitous carriage may have been forbidden by the Hepburn Act of June 29, 1906 * * *."

On pages 612 and 613, the Court admirably states the law:

"Neither the letter nor the spirit of the act (Hepburn) makes an outlaw of him who violates its prohibition by either giving or accepting gratuitous interstate carriage. The deceased no more forfeited his life, limb or safety and no more forfeited his right to the protection accorded by the local law to a passenger in his situation, than the carrier forfeited its right of property in the mail car upon which the deceased rode. His right to safe carriage was not derived, according to the law of Utah, from the contract made between him and the carrier, and therefore was not deduced from the supposed violation of the Hepburn Act. It arose from the fact that he was a human being of whose safety the plaintiff in error had undertaken the charge. With its consent he had placed his life in its keeping and the local law thereupon imposed a duty upon the carrier, irrespective of the contract of carriage.

"The Hepburn Act does not deprive one who accepts gratuitous carriage, under such circumstances, of the benefit and protection of the law of the state in this regard."

So. Pac. Ry. vs. Schuyler, 227 U. S., 601, 612-613 (57 Law Ed., 662).

(Syl.) 1. "Whether the highest state court should apply the law of the place of contract to a controversy respecting the right of a common carrier to limit its liability for negligence to the agreed valuation, is not a Federal question which

will sustain the jurisdiction of the Supreme Court of the United States over a writ of error to the state court.

(Syl.) 2. "The highest court of the State may administer the common law according to its own understanding and interpretation, without liability to a review in the Federal Supreme Court, unless some right, title, immunity, or privilege, the creation of the Federal power, has been arrested and denied.

(Syl.) 4. "No unlawful regulation of interstate commerce is made by the refusal of a state court to limit the liability of a common carrier for its negligence in the execution of a contract for interstate carriage to the valuation agreed upon, in the absence of congressional action providing a different measure of liability."

Pennsylvania R. R. Co. vs. Hughes, 191 U. S., 477; 48 L. Ed., 268; 24 Supreme Ct. Rep., 132.

"Where live stock is carried under a contract, and plaintiff accompanies it as caretaker, the law of the state in which the contract was made governs the right of a carrier to limit its liability to him, in the absence of Federal law on the subject, regardless of whether the shipment is interstate or not, since the contract is a single one, and the performance a continuous act."

Wiley vs. Grand Trunk Ry., 227 Fed., 127.

V.

CONCLUSION.

We beg leave therefore to suggest to the Court that the judgments of the Courts of Ohio, holding invalid the exempting clause on the back of the Mohney card pass D O 944, should not be disturbed, the Mohney pass being obviously an Ohio contract of carriage reading from

Toledo, Ohio, to Cleveland, Ohio, it having been used by Mohney in Ohio on an Ohio Railroad, and Mohney at the time of so using the pass having been injured in Ohio.

All of which is

Respectfully submitted,

MILLER, MILLER, BRADY & SEELEY,
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A. JAY MILLER,
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CHARLES H. BRADY,
Of Counsel.

TOLEDO, OHIO,
JANUARY 9, 1920.

INDEX

CASES CITED

IN THE

Supreme Court of the United States

October Term, 1918. No. 637. (26,723).

THE NEW YORK CENTRAL RAILROAD COMPANY,

Petitioner,

vs.

WILBUR H. MOHNEY,

Respondent.

ON CERTIORARI TO THE COURT OF APPEALS OF LUCAS COUNTY, OHIO.

BRIEF FOR PETITIONERS.

STATEMENT OF THE CASE.

The respondent, Wilbur H. Mohney, commenced this action in the Common Pleas Court of Lucas County, Ohio, for damages, complaining

> "that on or about March 29, 1916, he was an employee of the defendant, one of its locomo-

tive firemen; that in the early morning of the said day *he was riding as a passenger upon one of the defendant's passenger trains,* on transportation issued to him by defendant carrying him as a passenger from Toledo to Cleveland, Ohio, and on a train which on said morning was running in two sections, the plaintiff being seated in the rear coach of the first section of said train out of Toledo for Cleveland."

* * * * *

"the engineer of the second section of said train was grossly negligent and careless in that he did not *look for, see or observe* the danger signals which were displayed along the line far in the rear of the train of which plaintiff was riding and which showed that the track ahead of the second section was not clear and that to proceed along the said track would result in a collision."

* * * * *

"the said engineer of said second section, with gross carelessness, ran his train"

* * * * *

"Plaintiff further states that the said defendant, so acting through its engineer and servant, was grossly negligent and careless in the operation of the said second section which was following the first section on which plaintiff was riding."

Defendant's answer admits certain formal parts of the petition and

"admits that on said day, he was riding as a passenger upon one of the defendant's passenger trains on transportation issued to him by the defendant company, and that at said time, plaintiff was riding on a train running in two sections, and that the plaintiff was, at said time, oc-

cupying a seat in the rear coach of the first section of said train;"

* * * * *

"the second section of said train collided with the train on which plaintiff was riding, and that as a result of said collision, plaintiff sustained injuries."

But defendant denies that the engineer did not look for, see or observe the alleged danger signals as pleaded in the petition, as follows:

"And for a second defense, defendant alleges that, at the time of the injuries complained of in said petition, plaintiff herein was a passenger on defendant's train, riding on a free pass, issued by defendant and good between Collinwood, Ohio, and Air Line Junction, Ohio; that plaintiff was at said time on an interstate journey, from the City of Toledo, Ohio, to the City of Pittsburgh, Pennsylvania; that while using said pass on said 29th day of March, 1916, plaintiff was traveling on matters wholly personal, and in no manner connected with his employment with the defendant company; that said pass on which said plaintiff was riding as a passenger, was issued to the plaintiff gratuitously under the provisions of a statute of the United States, known as the Hepburn Act of June 29th, 1906, (Federal Stat. Ann. 1909, Supp. 255); one of the conditions endorsed on said pass, and agreed to by the plaintiff herein was the following:

'In consideration of receiving this free pass each of the persons named thereon, using the same, voluntarily assumes all risk of accidents and expressly agrees that the Company shall

not be liable under any circumstances, whether of negligence of itself, its agent, or otherwise, for any injury to his or her person, or for any loss or injury to his or her property; and that as for him or her, in the use of this pass, he or she will not consider the Company as a common carrier, or liable to him or her as such.' "

At the trial of said cause the only witness called was the respondent, *Wilbur H. Mohney,* who testified in chief, among other things:

"Q. On that morning you were going to the City of Cleveland, were you? A. Yes.

Q. And were you going beyond the City of Cleveland? A. Yes, sir.

Q. From the City of Cleveland, what other city were you bound for? A. Pittsburgh.

Q. What was your route? A. By the way of Youngstown over the Erie from Cleveland, and the P. & L. E. from there to Pittsburgh."

* * * * *

"Q. Now what happened as you were in the rear coach of First 86, on your way to Cleveland, that morning? A. You will have to ask somebody that knows; I was asleep."

And on cross examination:

"Q. You had received, at the ticket office here, a trip pass for yourself and wife from Toledo, by way of Ashtabula and Youngstown? A. Yes, sir.

Q. Then I understand there was left, at your request, a pass on the P. & L. E. for yourself and wife, with the ticket agent at Youngstown? A. Yes, sir."

The face of the pass (Pg. 17) read as follows:

"NEW YORK CENTRAL RAILROAD COMPANY
1916 West of Buffalo D O 944
Pass W. H. Mohney—
Account Engineer,
Between Collinwood—Air Line Jct.
Toledo Division
Until December 31, 1916. (Unless otherwise ordered *and subject to conditions on back.*)
Valid when countersigned by W. F. Schaff or J. H. Turner.
Countersigned D. C. MOON
J. H. TURNER *General Manager.*"

Certain facts were stipulated, to-wit:

1. "That the plaintiff was, on March 29th, 1916, and for some time prior thereto, in the employ of the defendant as a locomotive fireman, who had been promoted to an engineer, but had not yet been assigned to an engineer's run.

2. That New York Central employe's pass No. D O 944, good between Collinwood, Ohio, and Air Line Junction, Ohio, which is marked Exhibit 1, and is attached to this bill of exceptions and made a part hereof, was issued to the plaintiff by the defendant company.

3. That The New York Central Company was, on March 29th, 1917, and for some time prior thereto, an interstate railroad company, owning and operating a line of railroad from the City of Chicago, State of Illinois, to the City of New York in the State of New York.

4. That on the early morning of March 29th, 1916, the plaintiff boarded what is known as train "First 86" at Toledo.

5. That the plaintiff presented his employe's

annual pass, Exhibit 1, to the conductor of said train for transportation for Toledo to Cleveland.

6. That the passenger train upon which the plaintiff was riding on said 29th day of March, 1916, was, with the exception of the mail car thereon, a train containing cars from the City of Detroit, Michigan, and the City of Toledo, Ohio, through to the City of Pittsburgh, Pennsylvania.

That said train ran over the line of The New York Central Railroad Company to Cleveland, and over the line of The Erie Railroad Company from Cleveland to Youngstown, both in the State of Ohio, and from Youngstown to Pittsburg over the line of the Pittsburgh & Lake Erie Railroad.

7. That at the request of the plaintiff, a trip pass in favor of the plaintiff and his wife was secured by the defendant company, and left with the agent of the defendant company at the station in Youngstown, Ohio, providing transportation for the plaintiff and his wife from Youngstown, Ohio, to Pittsburg, Pennsylvania, over the line of the Pittsburg & Lake Erie Railroad Company.

8. That a trip pass was, at the request of the plaintiff's wife, issued by the defendant company, providing for the transportation of the plaintiff and his wife between the City of Toledo and the City of Youngstown.

9. That while on said train between the cities of Toledo and Cleveland, the car in which the plaintiff was riding was wrecked, and as a result thereof the plaintiff sustained certain injuries.

10. The following language appears on the back of said pass D O 944, Exhibit 1 herein:

Not good on Main Line 6, 19, 22, 25 or 26; or 21 and 43 on Toledo Division.

CONDITIONS.

In consideration of receiving this *free* pass, each of the persons named thereon, using the same, voluntarily assumes all risk of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence of itself, its agents, or otherwise, for any injury to his or her person, or for any loss or injury, to his or her property; and that as for him or her, in the use of this pass, he or she will not consider the company as a common carrier, or liable to him or her as such.

And, as a condition precedent to the issuing and use thereof, each of the persons named on the face of this pass states that he or she is not prohibited by law from receiving *free transportation*, and that the pass will be lawfully used.

If presented by any other than the person or persons named thereon, the conductor will take up this pass and collect fare.

I agree to the above conditions.

(*Signed*) W. H. MOHNEY,

To be signed in ink."

and it is admitted that the handwriting thereon is the signature of the plaintiff herein.

11. That the plaintiff is one of the parties designated in the so-called "Hepburn Act" of June 29th, 1906, as one to whom a pass may issue, as well as designated in the statutes of Ohio relative to the subject of the issuance of passes to railroad employes."

"It is hereby stipulated and agreed by and between the parties hereto, Wilbur H. Mohney, plaintiff, and The New York Central Railroad Company, defendant, that D. C. Moon, if called as a witness in this cause, would testify as follows:

1. That on March 29, 1916, and for some time prior thereto, he was general manager of The New York Central Railroad Company, defendant herein, with headquarters and offices at the City of Cleveland, Ohio, and had general supervision and control over all lines of the defendant's railroad, extending between the cities of Cleveland, Ohio, and Toledo, Ohio, and that he, the said D. C. Moon, continued in said capacity for many months after said March 29, 1916.

2. That the wreck occurring on the defendant's line near Amherst, Ohio, on or about March 29, 1916, in which the plaintiff received some injuries, was due to the fact that the engineman of the second section of defendant's train No. 86 disregarded the caution signal about 8,000 feet and the stop signal about 3,000 feet in the rear of the first section of defendant's train No. 86.

It is further stipulated that the foregoing statements of the said D. C. Moon, general manager of the defendant company as aforesaid, are hereby agreed upon in lieu of the plaintiff's taking the deposition of the said D. C. Moon, and that the said statements shall be admissible in evidence on the trial of this cause, on introduction by either party hereto, subject only to the objections based upon the materiality or relevancy of said statements to the issues in this action."

The Court of Common Pleas rendered judgment for Mohney and overruled defendant's motion for a new trial.

Proceedings in error were instituted in the Court of Appeals, which affirmed the judgment of the Common Pleas Court. The opinion of the Court of Appeals in full may be found at page 39 of this brief.

The Supreme Court of Ohio denied your petitioner's motion for an order requiring said Court of Appeals to certify its record, duly filed in that court, and its petition in error duly filed in the Supreme Court of Ohio was denied and dismissed.

SPECIFICATION OF ERRORS.

The judgment of the Court of Appeals of Lucas County, Ohio, was in derogation of, and against the petitioner's title, right, privilege and immunity claimed under the Constitution and Statutes of the United States, especially set up and claimed by petitioner, to-wit:

(1) The testimony of the respondent clearly showed that he was upon an interstate journey, that he was traveling upon a pass, and that the conditions were set forth thereon as above quoted, and that the signature thereon was that of respondent.

(2) The judgment in the trial court should have been rendered for petitioner.

(3) The motion of petitioner for a new trial should have been granted for the causes therein set forth.

(4) A petition in error was duly filed in the Court of Appeals alleging the errors complained of; the Court of Appeals found that "the stipulation and the testimony * * * showed conclusively that Mohney at the time of his injury, was upon an intersate journey," but affirmed the judgment of the Court of Common Pleas.

(5) The court failed to apply the federal rule with reference to the liability of the defendant in error, while traveling on such pass.

(6) Said judgment is repugnant to, and in conflict with, the laws of the United States, and especially the Act of Congress of the United States, approved February 4, 1887, and the acts amendatory thereof, known as the Interstate Commerce laws.

(7) Said judgment is repugnant to, and in conflict with the *Constitution of the United States,* and especially *Article* 1, *Section* 8, Clauses 3 and 18 thereof, to-wit:

> "The Congress shall have power * * *
> Clause 3. To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.
> Clause 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers

vested by the Constitution in the government of the United States, or in any department or offices thereof."

(8) Said judgment is repugnant to, and in conflict with Federal legislation and the common law rules as accepted and applied, in Federal tribunals.

(9) Said judgment is repugnant to, and in conflict with the Constitution, to-wit:

Amendments, Article V:

"* * * Nor shall any person * * * be deprived of life, liberty, or property, without due process of law."

Article XIV:

"* * * Nor shall any state deprive any person of life, liberty, or property, without due process of law."

BRIEF OF ARGUMENT.

The Contract of Carriage Was Interstate.

Respondent boarded a train at Toledo (Page 3*) in the State of Ohio, intending to go, and being bound for Pittsburg, (Page 12) in the State of Pennsylvania, (Page 16).

He was traveling upon an employee's annual pass, having presented same to the conductor of the train (Page 10). A trip pass had been issued to defendant and his wife for transportation from Toledo, Ohio, to

* The references in this brief will be to the transcript of record.

Youngstown, Ohio, and at respondent's request, a trip pass for the transportation of respondent and his wife from Youngstown, in the State of Ohio, to Pittsburgh, in the State of Pennsylvania, had been issued by petitioner, and left with the petitioner's agent at the station in Youngstown for respondent. (Page 10.)

Therefore, it is clearly evident that the respondent had been furnished with transportation for an interstate journey, and that when he boarded the train at Toledo, he had started upon an interstate trip and was then being transported by a common carrier engaged in the transportation of passengers from a place in one state to a point in another state.

Railroad Company v. Sabine Tram Company, 227 U. S., 111.

Syl. "Shipments of lumber on local bills of lading from one point in a state to another point in the same state destined from the beginning for export, under the circumstances of this case, are foreign and not intrastate commerce."

"It is the nature of the traffic and not its accidents which determine whether it is intrastate or foreign."

Pgs. 126-127. "That it is the nature of the traffic and not its accidents which determines its character is illustrated by *Ohio Railroad Commission v. Worthington,* supra. A rate of 70 cents a ton was imposed by the Commission on what was called 'Lake-cargo coal' from a coal field in Eastern Ohio to the ports of Huron and Cleveland, Ohio, on Lake Erie for carriage thence by lake vessels. The shipper transported

the coal ordinarily upon bills of lading to himself, or to another for himself, at Huron, and it appeared that the coal might be accumulated in large quantities at Huron and only taken out of the accumulated lots from time to time for the purpose of shipping out of the state. The rate of 70 cents, however, covered not only the transportation of the coal to Huron, but placing it on the vessels and trimming it for its interstate journey. It was held that its transportation to Huron was an interstate carriage."

Baer Bros. v. Railroad, 233 U. S., 479.

Pg. 490. "But while there was no through-rate and no through-route there was in fact, a through shipment from St. Louis, Missouri, to Leadville, Colorado. Its interstate character could not be destroyed by ignoring the points of origin and destination, separating the rate into its component parts and by charging local rates and issuing local waybills, attempting to convert an interstate shipment into intrastate transportation."

Railway v. Louisiana R. R. Commission, 236 U. S., 157.

Pg. 163. "When freight actually starts in the course of transportation from one state to another it becomes a part of interstate commerce. The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved. And generally when this interstate character has been acquired it continues at least until the load reaches the point where the parties originally intended that the movement should finally end."

McFadden vs. Railway, 241 Fed. Rep., 562.

Pgs. 565-566. "Whether commerce is interstate or intrastate must be determined by its essential character and not by mere billing or forms of contract. * * * Goods actually destined for points beyond the state of origin are necessarily in interstate commerce when they are delivered to the carrier and start in the course of transportation to another state. * * * This is true whether the goods are shipped on through bills of lading or on intial bills only to a terminal within the same state, where they are transhipped and thereafter transported on new bills of lading to a destination beyond the state."

Ohio R. R. Commission v. Worthington, 225 U. S., 101.

Pgs. 108-109. "By every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to be such, and the rate fixed by the Commission which is in controversy here is applicable alone to coal which is thus from the beginning to the end of its transportation, in interstate carriage, and such rate is intended to and does cover an integral part of that carriage, the transportation from the mine to the Lake Erie port, the placing upon the vessel and the trimming or distributing in the hold, if required, so that the vessel may complete such interstate carriage."

Terminal Co. v. Interstate Commerce Commission, 219 U. S., 498.

Pg. 527. "It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg and San Antonio Railway, they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose. The case, therefore, comes under *Coe v. Errol,* 116 U. S., 517, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another state, or delivered to a carrier for transportation.' "

The Court of Appeals found that respondent, at the time of his injury, was traveling upon an interstate journey. The journey being interstate, rights and liabilities thereunder are governed by the Federal laws exclusively. *Constitution of the United States,* Article I, Sec. 8, Clauses 3 and 18:

"The Congress shall have power * * *

Clause 3. To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.

Clause 18. To make all Laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or offices thereof."

Railway v. Rankin, 241 U. S., 319.

Pg. 326. "The state courts, treating the bill of lading as properly in evidence, undertook to determine its validity and effect. We need not, therefore, consider the mooted questions of pleading. The shipment being interstate, rights and liabilities of the parties depend upon acts of Congress, the bill of lading and common law rules as accepted and applied in Federal tribunals. *Cleveland & St. Louis Ry. v. Dettlebach,* 239 U. S., 588; *Southern Express Co. v. Byers,* 240 U. S., 612, and cases cited; *Southern Ry. v. Prescott,* 240 U. S., 632.

Railway v. Searle, 229 U. S., 156.

Pg. 158. "If the Federal statute was applicable, the state statute was excluded by reason of the supremacy of the former under the National Constitution. *Second Employer's Liability Cases,* 223 U. S., 1, 53; *Michigan Central Railroad Co. v. Vreeland,* supra."

Turnan et al v. Railway, 105 So. Car., 287.

Pg. 289. "In the instant case, the Federal law must control, for the contract of carriage was interstate, and was dependent upon the Act of Congress regulating passes for employees' families."

Prigg v. Pennsylvania, 16 Pet., 539.

Pg. 617. "For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State Legislatures have a right to interfere, and,

as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it."

Railway v. Prescott, 240 U. S., 632.

Pgs. 639-640. "As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse requirements of state legislation and decisions. And the question as to the responsibility under the bill of lading is none the less a Federal one because it must be resolved by the application of general principles of the common law."

Under the *Interstate Commerce Law,* the railroad can lawfully issue passes to certain classes of persons only. Sec. 1 (*U. S. Compiled Statutes,* Sec. 8563).

"The provisions of this Act shall apply to any corporation or persons * * * * engaged in the transportation of passengers or property wholly by railroad * * * from one state or territory of the United States * * to any other state or territory of the United States, * * *"

"No common carrier subject to the provisions of this act shall * * * directly or

indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law * * *."

Sec. 22 (U. S. Compiled Statutes, Sec. 8595).

"* * * Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees. * * *."

A pass issued by a railroad for interstate transportation to an employee must be deemed gratuitous in view of the prohibitions in Section 2 of the *Interstate Commerce Law,* (U. S. Compiled Statutes, Sec. 8564):

Sec. 2. "That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

THE PASS WAS GRATUITOUS

Respondent was an employee of the petitioner, a common carrier (Page 10), as a locomotive fireman who had been promoted to be a locomotive engineer. Therefore he was a person to whom a free pass could be issued in conformity with the law. He had so admitted in writing when he signed the pass, which he presented at the commencement of his journey. (Page 11), and in the same agreement he stated that the pass would be lawfully used. He could not have lawfully used the pass, except as a free pass. There is no proof of any tariff of the carrier authorizing the use of the pass not as a free pass, or for any purpose. Either it was a free pass, or he was a trespasser.

Under the law, the carrier can lawfully issue passes to certain classes of persons only: *Interstate Commerce Law,* Sec. 1, (U. S. Compiled Statutes, Sec. 8563):

> "The provisions of this Act shall apply to any corporation or persons * * * engaged in the transportation of passengers or property wholly by railroad * * * from one state or territory of the United States * * to any other state or territory of the United States, * * *"
>
> "No common carrier subject to the provisions of this act shall * * * directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law * * *."

Sec. 22 (U. S. Compiled Statutes, Sec. 8595).

"* * * Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees * * *."

In view of the prohibitions of the law, a pass issued to an employe must be deemed to be gratuitous.

Interstate Commerce Law, Sec. 2, (U. S. Compiled Statutes, Sec. 8564:

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Sec. 6 (U. S. Compiled Statutes, Sec. 8569).

"No carrier, unless otherwise provided by this Act, shall engage or participate in the trans-

portation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property ,or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Railway v. Rankin, 241 U. S., 319.

Pg. 327. "It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and in respect of transactions in the ordinary course of business it is entitled to the presumption of right conduct. The law 'presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to

the maximum, *omnia presumuntur rite et solemniter esse acta, donec probetur contrarium.'* "

Railway v. Maxwell, 239 U. S., 94.

"Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it."

Railway v. Thompson, 234 U. S., 576, infra.

Page 577: "The main question is whether when the statute permits the issue of a 'free pass' to its employees and their families it means what it says. * * * We think it plain that the statute contemplates the pass as gratuitous."

The majority of the Court of Appeals of Lucas County, Ohio, found that the pass was issued to respondent in part consideration for his services. The dissenting view was based on the Thompson case.

Validity of the Stipulations of the Pass.

A carrier may validly stipulate that it shall not be liable for injuries to the person to whom the pass is issued.

Railroad vs. Thompson, 234 U. S., 576:

Pgs. 576-7. "The plaintiff, Lizzie Thompson, sued the Railroad Company, the plaintiff in error, to recover for personal injuries inflicted upon her while she was a passenger upon a train that was carrying her from South Carolina

to Georgia. The railroad pleaded that she was traveling on a free pass that exempted the company from liability, the same having been issued to her gratuitously under the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, Sec. 1, as wife of an employee. This plea was struck out subject to the defendant's exception. The defendant also asked for an instruction that if the plaintiff was traveling on a free pass providing that the railroad should not be liable for negligent injury to her person she could not recover."

Pgs. 577-8. "The main question is whether when the statute permits the issue of a 'free pass' to its employees and their families it means what it says. The railroad was under no obligation to issue the pass. It may be doubted whether it could have entered into one, for then the services would be the consideration for the duty and the pass and by Sec. 6 it was forbidden to charge 'a greater or less or different compensation' for transportation of passengers from that in its published rates. The antithesis in the statute is between the reasonable charges to be shown in its schedules and the free passes which it may issue only to those specified in the act. To most of those enumerated the free pass obviously would be gratuitous in the strictest sense, and when all that may receive them are grouped in a single exception we think it plain that the statute contemplates the pass as gratuitous in the same sense to all. It follows, or rather is saying the same thing in other words, that even on the improbable speculation that the possibility of getting an occasional free pass entered into the motives of the employee in working for the road, the law did not contemplate his work as a conventional inducement for the

pass but on the contrary contemplated the pass as being what it called itself, free.

As the pass was free under the statute, there is no question of the validity of its stipulations. This was conceded by the Court of Appeals, as we have stated, and is established by the decisions of this court. *Northern Pacific Ry. Co. v. Adams*, 192 U. S., 440. *Boering v. Chesapeake Beach Ry. Co.*, 193 U. S., 442."

Boering v. Railway, 193 U. S., 442.

Pg. 448. "This was an action brought in the Supreme Court of the District of Columbia to recover damages for personal injuries sustained by Mrs. Boering while riding in one of the coaches of the defendant, and caused, as alleged, by the negligence of the company.

"A trial before the court and a jury resulted in a verdict and judgment for the defendant, which was affirmed by the Court of Appeals of the District, 20 D. C. App., 500, and thereupon the case was brought here on error."

Page 450. "Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not. *Squire v. New York Central Railroad*, 98 Massachusetts, 239; *Hull v. Boston, Hoosac Tunnel & Western Railroad*, 144 Massachusetts, 284; *Boston & Maine Railroad v. Chipman*, 146 Massachusetts, 107."

"So in *Muldoon v. Seattle City Railway Company*, 10 Washington, 311, 313:

" 'We think it may be fairly held that a person receiving a ticket for free transportation is bound to see and know all of the conditions printed thereon which the carrier sees fit to lawfully impose. This is an entirely different case

from that where a carrier attempts to impose conditions upon a passenger for hire, which must, if unusual, be brought to his notice. In these cases of free passage, the carrier has a right to impose any conditions it sees fit as to time, trains, baggage, connections, and, as we have held, damages for negligence; and the recipient of such favors ought at least to take the trouble to look on both sides of the paper before he attempts to use them.'

"See also *Griswold v. New York, &c., Railroad Company*, 53 Connecticut, 371; *Illinois Central Railroad Company v. Read*, 37 Illinois, 484, 510. As was well observed by Circuit Judge Putnam in *Duncan v. Maine Central Railroad Company*, 113 Fed. Rep., 508, 514, in words quoted with approval by the Court of Appeals in this case:

" 'The result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted.'

"We see no error in the record, and the judgment of the Court of Appeals is affirmed."

In view of the foregoing authorities, the record discloses a case in which no liability could properly be imposed upon the petitioner.

Opinion of Court of Appeals of Lucas County, Ohio.

The opinion of the Court of Appeals of Lucas County, Ohio, is set forth in full at page 39 of this brief. In the opinion, the Court of Appeals states:

> "This court is unanimously of the opinion that the finding of the Court of Common Pleas, that the accident in this case was the result of gross negligence on the part of the railroad company, is abundantly sustained by the evidence before the trial court. The trial judge evidently gave full credit to the testimony which it was stipulated the General Manager of the Railroad Company would give if called as a witness and by virtue of the language of that stipulation, we think the trial court might well have characterized the negligence involved in stronger terms. In fact, we are clearly of the opinion that the negligence in this case, under the evidence, was willful and wanton.
>
> "We think the decisions throughout the country, state as well as federal, are practically unanimous to the effect that a contract relieving the railroad company from the results of negligence of the character which I have mentioned, are clearly against public policy and void."

The Appellate Court's opinion was the first intimation to the parties that the conduct of the carrier was "under the evidence," willful and wanton. It was not so pleaded. Apparently the court itself felt that, in order to bolster up its finding, there was need of a suggestion of an apparent showing of negligence by evidence, which it styled "of the character I have mentioned," to support it. The lack of this evidence is stated above. "Obviously this is a slender thread on which to hang a grave * * * argument."

No Evidence of Willfulness and Wantonness.

The only testimony in the record upon the subject is the stipulation that if D. C. Moon were called as a witness, that he would testify "that the engineman of the second section * * * disregarded the caution signal about 8,000 feet and the stop signal about 3,000 feet in the rear of the first section * * *."

The respondent testified:

> "Now what happened as you were in the rear coach of First 86, on your way to Cleveland, that morning?"
>
> "You will have to ask somebody that knows; I was asleep."

When the stipulation used the word "disregard," it should be taken in the ordinary meaning of the word. The Century dictionary defines "disregard," "V. T. To omit to regard or take notice of; overlook, specifically to treat as unworthy of regard or notice." The same authority defines "regard" as "To look upon; observe; notice with particularity; pay attention to."

It is pleaded that the "signals were at said time, covered by a sheet of fog, so that they could not, and were not observed by the engineer."

Suppose to make the meaning more clear, we substitute for the word "disregard" its synonyms. The words of the stipulation (page 18) would then read:

> "That the wreck * * * was due to the fact that the engineman * * * "overlooked, did not observe, did not notice with particularity," the caution signal * * * and the stop signal * * *."

When, owing to a sheet of fog so dense that the locomotive engineer did not observe the signals, the engineer is said to disregard the signals, i. e., omit to regard, overlook them, not look upon them, or observe them, he is not guilty of wanton or willful negligence.

Willfulness and wantonness was neither pleaded by plaintiff below, nor did counsel in either court, at any time, claim that the carrier was guilty of willfulness or wantonness. That claim was originated by the Court of Appeals of Lucas County.

Thompson's Commentaries on the Law of Negligence, White's Supplement, Sec. 22.

"Wanton or willful negligence is defined as such a gross want of care and regard for the rights of others as to imply a disregard of consequences or a willingness to inflict injury. The same idea is conveyed in an approved instruction to the effect that 'before a party can be said to be guilty of willful or wanton conduct, it must be shown that the person charged therewith was conscious of his conduct, and conscious from his knowledge of existing conditions that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injury.' *The purpose to inflict willful injury does not exist when the result of the wrongful conduct may be reasonably attributed to mere negligence or inattention to duty.*"

White's Personal Injuries on Railroads, Sec. 14.

"To constitute wanton negligence it is essential that the act done or omitted must have been done or omitted with a present knowledge that injury would result therefrom, for without this consciousness the omission would be absence of care alone. *Hence it is, that a mere inadvertent failure to observe due care indicates mere negligence,* but a conscious failure to observe due care constitutes willfulness."

Shearman & Redfield, Vol. I, Sec. 114a, 6th Ed.

"That one may be chargeable with wanton or reckless conduct, showing a conscious indifference to the consequences to others, equivalent to well intent, he must have realized the peril to another, or that such conduct was likely or would probably place him in such danger as he could not rescue himself from "

Stewart v. Railroad Co., 32 Iowa, 561.

Pg. 563. "A willful act is an obstinate, stubborn, perverse act, and an act done willfully is one done stubbornly, by design, with a set purpose." (See also *Lee v. Rd.,* 66 Iowa, 131).

Fluckey et al. v. Southern Ry. Co., 242 Fed., 468.

"Gross and wanton negligence of a railway company, to avoid the contributory negligence of a person struck by a railway motor car, must be really willful or so highly reckless as to con stitute the equivalent of willfulness."

Railway v. Miller, 149 Ind., 490.

Pg. 502. "Negligence in a case, whether it be in a degree that may be termed slight, ordinary, or gross, is nevertheless negligence still; and when willfulness is the essential element in the act or conduct of the party charged with the wrong, the case ceases to be one of negligence.

"Willfulness and negligence are the opposites of each other; the former signifying the presence of intention, and the latter its absence."

Pg. 509. "The jury, by this finding, expressly attribute the death of the deceased to the negligent act of the fireman in omitting to give any signals, and, while this act of omission on the part of the employes in control of the engine may be said to be negligence *per se*, still *it was but an act of nonfeasance, and not one of aggressive character, and cannot establish the willful or intentional killing as alleged in the complaint.* For, as heretofore asserted, when willfulness is the element in the act or conduct of the party charged, the case ceases to be one of negligence. There can be no middle ground between willfulness and negligence, for, as we have seen, the authorities affirm that each of these elements is the opposite of the other. Consequently, when the facts in a given case show that the injury of which the plaintiff complains is the result of the negligent act or conduct of the defendant, then the fact that such negligence may be said to be of such a degree as to be considered 'gross negligence' cannot support a charge that the injury was willful or intentionally inflicted by the party accused."

King v. Railroad, 114 Fed., 855 (C. C. A., 5th Cir.)

Syl. 2. "Where a man, just after stepping on a railroad track in the yards, was run over by part of a freight train backing at the rate of about eight miles per hour, while the conductor, who was on the rear car, was looking in the opposite direction to see if a switch was properly turned for a passing train, and none of the trainmen saw the man on the track, there was no such wanton recklessness or gross negligence as would render unavailable a plea of contributory negligence."

Fluckey et al. v. Southern Ry. Co., 242 Fed., 468 (C. C. A., 6th Cir.)

Pgs. 470, 471. "The plaintiff here does not claim any evidence tending to show an intention on the part of the motorman to injure the plaintiff nor any actual willfulness. She seeks to build up a constructive willfullness through the cumulative effect of the violation of city ordinances. One ordinance required gates or flagmen at all railroad crossings within the corporate limits; this crossing had neither. Another forbade that railroad cars should be left standing within 150 feet of the highway crossing, so that they would obstruct the view down the track; a car was standing within that distance. A third ordinance (as we assume for the purpose of this opinion), limited to six miles per hour the rate of speed of all trains or cars within the city limits: this motor car was moving at a higher speed.

* * * * * * * * * *

"No one claims, however, that the violation

of a single ordinance is even evidence of wanton or willful negligence; and, indeed, no reason is suggested upon which such a claim could have been based.

"Plaintiff's position is that the simultaneous violation of three city ordinances indicates a degree of indifference or recklessness which should have the same effect as deliberate willfulness. We cannot think that this inference is permissible, merely from this basis and regardless of the character of the ordinance or the nature of the violation. If the breaking of one ordinance is not of itself at all indicative of willfulness, the multiplication of such instances cannot create a basis of inference otherwise non-existent.

"* * * * in cases like the present, the intent to run over a traveler upon the highway has no connection with the intent not to observe the ordinances, and the utmost that can be established by the breach of several ordinances is a general indifference to the observance of municipal regulations. Between this inference and the other one, there is no bridge; and the case is one for the application of the arithmetical rule that the addition of nothing to nothing cannot make something.

"A review of all the cases cited by plaintiffs develops that in each one wanton or willful negligence was inferred from the character of defendant's acts, and not primarily merely from the ordinance violations; and when we turn aside from the theory that the breach of three ordinances in gross inherently tends to show wantonness, and consider the nature and effect of the breaches here involved, we get the same result. There had been no municipal determination that this particular crossing needed gates

or a flagman; the ordinance was equally imperative as to every crossing in the city; and we must take notice of the vast number of such crossings within the corporation limits of every large city, where the degree of need for this precaution is not extreme."

Louisville & N. R. Co. v. Muscat & Lott, 41 So., 302.

Syl. 1. "The act of persons in charge of a railroad train in intentionally running it over a public street crossing in a city at a speed more rapidly than allowed by ordinance is not wanton or willful misconduct, unless the persons in charge had knowledge and were conscious that injury would probably result."

Railroad v. Mitchell, 134 Ala., 261.

Pg. 265. "The count alleges, that 'defendant through its servant or agent in charge of control of said locomotive engine, wantonly or intentionally caused the death of plaintiff's intestate in the manner following, viz: said servant or agent, with knowledge or notice that numerous persons were or would likely be upon the tracks of said railroad in said town or village of Elmore, and would be in great peril of their lives from the rapid running of said engine through said town or village, without proper and sufficient warning or notice of the approach of said engine, wantonly or intentionally ran said engine through said town or village with great rapidity and without proper or sufficient warning or notice of the approach of said engine, and as a proximate consequence thereof, said engine ran upon or against plaintiff's said

intestate in said town or village, and so injured him that he died.' "

Pgs. 265, 266. "Stripped of all unnecessary verbiage, the wanton or intentional act set up in this count is, that the engineer 'wantonly or intentionally ran said engine through said town or village, with great rapidity and without sufficient warning or notice of the approach of the engine,' with knowledge or notice that numerous persons were or would likely be upon the tracks of said railroad—as a proximate consequence of which wanton or intentional act of running the engine rapidly, without proper or sufficient warning, the deceased was killed. This was not an averment of an intention to injure the intestate, and, therefore, is not the equivalent of willfulness; nor is it an averment of a reckless disregard as to probable consequences, such as would make it wantonness on the part of the engineer."

Railway v. Fisk, 159 Fed., 373.

Pg. 377. "In reference to liability for injury to a trespasser, the doctrine is settled in this jurisdiction at least, that it arises only for injuries wantonly inflicted, which involves timely discovery and willful disregard of the danger in running the trespasser down—criminal conduct, and not negligence, in any sense of the term."

It is apparent that when on account of the fog the engineer did not see the signals, or disregarded them, he was not under the definitions, guilty of negligence which was willful and wanton. It was not a conscious failure to observe due care. This omission of duty,

even though constituting negligence, did not amount to wantonness or willfulness. And there is no evidence of willfulness or wantonness in the record.

Only Gross Negligence Pleaded.

The petition complained of gross negligence, to-wit: "the engineer of the second section * * * * was grossly negligent and careless in that he did not look for, see or observe the danger signals which were displayed." The answer denies this and also alleges "that those in charge of the second section * * * were unable to, and did not see the so-called "Block signals," for the reason that said signals were at said time, covered by a sheet of fog, so that they could not, and were not observed by the engineer in charge of said second section.

There are no allegations in the pleadings nor does the proof show willfulness or wantonness. Surely the cause of action upon which a plaintiff is to recover must be pleaded, as well as supported by the evidence. There being no willful or wanton negligence pleaded, no recovery can be had therefor, even if such had been proved.

> Gentry vs. U. S., 101 Fed., 51 (C. C. A. 8th Cir.)
>
> "One may not bring a suit for one cause of action, and recover judgment for another. A court can consider only what is in issue under the pleadings. Averments without proofs, and

proofs without averments, are unavailing. The judgment may not go beyond a determination of the issues presented by the pleadings, nor beyond the scope and object of the prayers they contain. These are axioms in the law of pleading and practice. They rest upon the basic principles of one jurisprudence, that no man shall be deprived of his life, liberty and property without due process of law; and due process of law must give to the parties to be affected an opportunity to be heard respecting the justice of the judgment sought. It must be one which gives notice of the issue to be determined, which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial."

In re Rosser, 101 Fed., 562.

Page 568: "It is an axiom of pleading and practice that one may not bring a suit for one cause of action and recover a judgment for another, much less may one recover an order or judgment for money and property without any suit or notice of the claim upon which it is founded."

* * * * * * * * * *

"Such a proceeding lacks every element of due process of law."

In re Wood and Henderson, 210 U. S., 246.

Page 254: "The course of legal proceedings necessary to be had to affect private rights is well stated by Judge Sanborn in Rosser's Case, cited. He says at page 159, Am. Bankr. R. and page 567, 101 Fed. Rep.: 'Such a course must be appropriate to the case, and just to the party affected. It must give him notice of the charge

> or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained.' "

No Basis for State Court's Decision.

The respondent having started from Toledo, in the State of Ohio, to Pittsburgh, in the State of Pennsylvania, was upon an interstate journey. The Court of Appeals so found. At the commencement of his journey, he had been supplied with the means of traveling upon free passes from Toledo to Pittsburgh, the purpose of his journey being to attend his mother's funeral. These passes were gratuitous, but the majority of the Court of Appeals found to the contrary.

That court, as indicated above, also denied the asserted Federal rights on a basis of fact having no support in the record, when it rendered judgment against petitioner upon the evidence set forth in the record in this case.

Postal Telegraph Cable Co. vs. Newport, 247 U. S., 464.

> Page 473: "But the question arises, whether the basis of fact upon which the state court rested its decision denying the asserted federal rights has any support in the record; for if not, it is our duty to review and correct the error."

CONCLUSION.

In conclusion petitioner respectfully submits that it has demonstrated errors of the Court of Appeals of Lucas County, Ohio, that the judgment of the Court of Appeals is in derogation of, and against, your petitioner's title, right, privilege and immunity especially set up and claimed under the Constitution, Act to Regulate Commerce, and the common law rules as accepted and applied in Federal tribunals, and therefore petitioner submits that the judgment of the Court of Appeals of Lucas County, Ohio, should be reversed and petitioner should be awarded all costs.

DOYLE & LEWIS,
Attorneys for Petitioner.

HOWARD LEWIS,
FREDERICK W. GAINES,
Of Counsel, Toledo, Ohio.

OPINION OF COURT OF APPEALS, LUCAS COUNTY, OHIO.

THE NEW YORK CENTRAL RAILROAD COMPANY,

vs.

WILBUR H. MOHNEY.

Error to the Court of Common Pleas.

KINKADE, J. This is a proceeding in error to reverse a judgment recovered by Mohney against the Railroad Company for injuries sustained, as he claimed, through the negligence of the Company when he was riding upon one of the Company's trains as a passenger.

Mohney was in the employ of the Railroad Company in the capacity of fireman. He had been in the employ of the Company about six years and had taken his examination for a position as engineer, had passed the examination successfully, but had not yet been assigned to employment as an engineer. At the time of his injury, Mohney was riding upon an annual pass that had been issued to him by the Company, entitling him to ride over the Company's line of railroad on all trains except seven, which were enumerated on the back of the pass. between the stations of Air Line Junction near Toledo and Collinwood, near Cleveland. The injury to Mohney occurred near the town of Amherst, between Cleveland and Toledo. The pass held by Mohney, on its face, read as follows:

"NEW YORK CENTRAL RAILROAD COMPANY
1916 West of Buffalo D O 944
Pass W. H. Mohney—
Account Engineer
Between Collinwood—Air Line Jct.
Toledo Division
Until December 31, 1916
Unless otherwise ordered
and subject to conditions
on back.
Valid when countersigned by W. F. Schaff or J. H. Turner.
Countersigned, J. H. Turner.
D. C. MOON,
General Manager."

The matter on the back of the pass read as follows:

"Not good on Main Line 6, 19, 22, 25 or 26, or 21 and 43 on Toledo Division.

CONDITIONS

In consideration of receiving this free pass, each of the persons named thereon, using the same, voluntarily assumes all risk of accidents, and expressly agrees that the Company shall not be liable under any circumstances, whether of negligence of itself, its agents, or otherwise, for any injury to his or her person, or for any loss or injury to his or her property; and that as for him or her, in the use of this pass, he or she will not consider the Company as a Common Carrier, or liable to him or her as such.

And, as a condition precedent to the issuing and use thereof, each of the persons named on the face of this pass states that he or she is not prohibited by law from receiving free trans-

portation, and that the pass will be lawfully used.

If presented by any other than the person or persons named thereon, the conductor will take up this pass and collect fare.

I AGREE TO THE ABOVE CONDITIONS.

W. H. MOHNEY
To be signed in ink."

Mohney, at the time the pass was issued to him, signed his name on the back of the pass as appears above.

At the time of the injury to Mohney he was not riding upon his pass in furtherance of the performance of any duty which he owed to the Railroad Company but was on a journey from Toledo to Pittsburgh, Pennsylvania, for the purpose of attending the funeral of his mother that was to be held near Pittsburgh. The accident that resulted in injury to Mohney was caused by the second section of a passenger train colliding with the first section near the town of Amherst. Mohney was on the first section in a passenger car and was very severely injured.

The case was tried in the Court of Common Pleas upon a stipulation entered into between the parties, which embraced most of the essential facts in the case and included in this stipulation was the amount of damage that Mohney sustained in case he should be found entitled to recover, to-wit: $9,750.00, and the judgment that was entered in his favor was for this amount thus fixed in the stipulation. In addition to the stipulation,

Mohney testified in his own behalf and in the course of his testimony detailed what was said to him by the representative of the Railroad Company, with whom he arranged his employment, concerning the pass that was to be issued to him and also stated the incidents connected with the trip that he was making from Toledo to Pittsburgh as stated. In addition to this testimony of Mohney, it was agreed between counsel for the plaintiff and the defendant that if D. C. Moon, who was the General Manager of the New York Central Railroad Company, in charge of the Division on which the accident occurred, were called as a witness to testify in the case, he would say that the accident was caused by the engineer of the second section of the train disregarding a cautionary signal stationed some eight thousand feet distant from the scene of the collision and disregarding also a stop signal located three thousand feet distant from the point of the collision.

Mohney intended to reach his destination in Pennsylvania by riding on his pass from Toledo to Cleveland, paying his fare from Cleveland to Youngstown and riding between those points on the same train on which he traveled from Toledo to Cleveland, and then continue his journey from Youngstown to Pennsylvania over the line of the Pittsburgh & Lake Erie Railroad Company, over which his employer, the New York Central Railroad Company, had procured for him a pass from Youngstown to Pittsburgh and return. The train upon which Mohney left Toledo, with the exception perhaps of one car to be cut out at Cleveland, was

a train running through from Toledo to Pittsburgh, and Mohney could have gone to Pittsburgh on this train. Mohney intended not to continue his journey from Youngstown to Pittsburgh on this train for the reason that he desired to get certain information from a relative living near Pittsburgh, by telephone from Youngstown before leaving Youngstown, and for the additional reason that the train from Toledo did not stop at a station near Pittsburgh at which Mohney believed he would desire to leave the train. The pass that Mohney was to ride on from Youngstown to Pittsburgh had been left for him at the station of the Pittsburgh & Lake Erie Company in Youngstown. He had determined that if he went through from Toledo to Pittsburgh on the same train, which by the way, ran over the line of the Pittsburgh & Lake Erie from Youngstown to Pittsburgh, he would arrive in Pittsburgh at such time as that he would have several hours there to wait before he could reach the station nearby to which he wished to go and on another road. The considerations which I have enumerated, induced Mohney to determine that he would leave the train on which he started from Toledo, at Youngstown, remain there for a few hours, attend to his telephoning, pick up the pass that was awaiting him there and then take another train later in the day for Pittsburgh, which was scheduled to stop at the station where he believed he would want to alight to meet his convenience with respect to attending the funeral in question.

On the trip in question, Mohney presented his pass to the conductor of the first section of the train and the pass was accepted as entitling him to ride between Toledo and Cleveland.

The case was submitted to the trial court, a jury being waived, on the stipulation and the testimony to which I have referred. The trial court found that Mohney was an intra-state pasenger; that he was travelling upon a pass that had been issued to him in part pay for services that he was to render for the company; that the injury that had been inflicted upon Mohney was caused by the gross negligence of the Railroad Company, and that the conditions on the back of the pass, relieving the Railroad Company from liability for negligence, were contrary to public policy, were invalid and afforded no defense to the claim of Mohney for damages, and, as stated, judgment was entered accordingly.

Several grounds of error are assigned as demanding the reversal of this judgment. The principal questions insisted upon in this case are:

First: That the finding of the Court that Mohney was an intra-state passenger was not sustained by the evidence, the claim of railroad company's counsel being that the evidence before the trial court, the stipulation and the testimony referred to, showed conclusively that Mohney, at the time of his injury, was upon an interstate journey.

Second: Counsel for the Railroad Company insist that Mohney at the time of his injury was a passenger being carried as a gratuity and that the annual

pass issued to him was a gratuity in every sense and was in no wise compensated for by his services.

Third: That the conditions and release on the back of the pass signed by Mohney, was a valid undertaking between him and the Railroad Company and a complete defense to the cause of action asserted in this case.

Counsel for Mohney insists that the findings and judgment of the trial court are all sustained by the evidence on which the case was submitted.

The case has been very fully argued both in brief and orally and this Court has devoted an unusual amount of time to the examination of the questions raised and the authorities cited as well as numerous authorities not cited by counsel. Any attempt to review in detail the numerous authorities touching the different positions of counsel and the questions involved in this case, we think would serve no useful purpose. The fact is, there is quite a marked difference between the holdings of the Federal Courts with respect to what does and what does not constitute a violation of public policy, with respect to contracts of this kind and the decisions of many of the State courts upon the same subject. The decisions of the Courts of the different States are by no means in harmony upon this subject.

It should be mentioned here that at some time in connection with his employment, the precise time is not stated by Mohney, he made no inquiry about having a rate book, showing the scale of wages of employees of his class, and a pass and at the time of this inquiry the

official of whom he made the inquiry gave him the rate book and answered that passes were not issued until after the employee had been in the service of the Company for six months. We think the language used by Mohney was intended to mean, if it does not state it with entire accuracy, that this conversation took place before he began his work. At that time, at least so far as Mohney was concerned, the passes that were issued to him were first quarterly and later semi-annually and later still, annually. For about six years prior to the time of his accident he had possessed and use the pass of the Company in substantially the same form as the one copied in this opinion and for the last two or three years at least, the pass had been given to him annually.

We think it is proper to consider the facts attending the issuing of the passes to Mohney, as testified to by him and the conduct of the railroad Company in issuing these various passes to Mohney covering the entire time of his employment, excepting the first six months, and a majority of the Court are of the opinion that this conduct of the Company is an important circumstance in determining whether the passes were issued in consideration of his employment, and, when taken in connection with the testimony showing what was said by the parties, is sufficient to sustain the finding of the trial court that the pass in question was in fact issued in consideration of his employment.

The following authorities seem to sustain this position:

Doyle, Admr. v. Fitchburg Railroad Co., 166 Mass. 492.
Dugan vs. Blue Hill Street Ry. Co., 193 Mass. 431.
Eberts vs. Railway Company, 151 Mich. 250
Williams vs. Railroad Co., 17 Utah 210; 72 Am. St. Rep. 777.
Walther vs. Southern Pacific Co., 159 Cal. 769. This case is also reported in 37 L. R. A. (N. S.) 235, where it is fully annotated.
10 Corpus Juris, 632, and following pages.
Whitney vs. Railroad Co., 102 Federal Rep. 850.
Tripp vs. Michigan Central R. R. Co., 238 Federal Rep. 449, 458.

I would be very glad to concur in the position taken by the other members of the Court that Mohney's pass was issued to him in part consideration of his services and I would have no difficulty in doing so were it not for the decision of the Supreme Court of the United States in the case of *Charleston & Western Carolina Railway Company vs. Thompson,* 234 U. S. 576.

While it is true that in the case of *Railway vs. Thompson* last cited, the pass had been issued to a member of the employee's family, one which the Supreme Court said the railroad company was under no obligation to issue, and was a trip pass between a point in one state and a point in another state, and the opinion of

the Court must be read with reference to the particular case that the Court was deciding, nevertheless speaking for myself alone, it seems to me that the language of Justice Holmes in the opinion is sufficiently broad in scope to clearly indicate that that Court would hold, if the question were before them, that a pass issued to an employee under circumstances like those attending the issue of the pass in the case at bar, was a free pass and not issued in any sense in consideration, to any extent, of the services to be rendered by him. It is on this account, and this account alone, that I find myself constrained to differ from my associates on the question stated. It is a fact that since the decision of *Railway vs. Thompson*, the question has again been before the Supreme Court of the United States with respect to a contract relieving the railroad company from liability for negligence under a pass issued to a drover, one travelling upon a train accompanying a shipment of live stock, in the case of *Norfolk Southern Railroad Company vs. Chatman*, 244 U. S. 276. In that case Mr. Justice Clarke, who delivered the opinion of the Court, reviewed extensively the various Federal decisions with respect to contracts limiting liability of the character in question, insofar as they apply to passes issued to drovers and distinguishes the case from the case of *Railroad vs. Thompson*, 234 U. S. 576, cited. After considering the very comprehensive, interesting and illuminating opinion by Justice Clarke, it still seems to me that the opinion in the case of *Railroad vs. Thompson* has the scope that I have mentioned.

This Court is unanimously of the opinion that the finding of the Court of Common Pleas, that the accident in this case was the result of gross negligence on the part of the railroad company is abundantly sustained by the evidence before the trial court. The trial judge evidently gave full credit to the testimony which it was stipulated the General Manager of the Railroad Company would give if called as a witness and by virtue of the language of that stipulation, we think the trial court might well have characterized the negligence involved in stronger terms. In fact, we are clearly of the opinion that the negligence in this case, under the evidence, was willful and wanton. Signals upon railroads, cautionary and stop signals, are indeed of little moment with respect to the safety of passengers travelling thereon if the engineer, whose duty it is to observe and heed them, may "disregard" them and that is precisely what the stipulation says the General Manager, Mr. Moon, would have testified to had he been called as a witness, was done by the engineer and there is nothing in the record to either modify or contradict this in any respect.

We think the decisions throughout the country, State as well as Federal, are practically unanimous to the effect that a contract relieving the railroad company from the results of negligence of the character which I have mentioned, are clearly against public policy and void, and this is true whether the passenger is one who is being carried gratuitously or whether he is riding on

a pass that has been issued for a consideration. If the case rested upon this ground alone and we were to hold that Mohney's pass was not issued in part consideration for his services, but was a gratuity pure and simple, we would have no hesitancy in reaching the conclusion that the judgment of the Court of Common Pleas should be affirmed.

The authorities, both State and Federal, are practically unanimous in holding that where the pass is issued for a consideration, a contract relieving the railroad company from liability for negligence resulting in injury to a passenger using the pass, is void as against public policy.

The language of the Federal Statute, the Hepburn Act, and the language of the Ohio Statute, Section 516 of the General Code, with respect to the list of persons to whom passes may be issued are practically identical.

The members of this Court are unanimous in the opinion that Mohney, although riding upon a pass that was good between two stations, to-wit: Air Line Junction and Collinwood, both located in the State of Ohio, was nevertheless, at the time of his injury travelling upon an interstate journey and was not an intra-state passenger as claimed by counsel for Mohney and as found by the trial court.

In view of the opinion of the majority of the Court that Mohney's pass was issued for a consideration as stated, and the opinion of all the members of the Court that the negligence was willful and wanton, we might pass as immaterial the question whether it was an inter-

state or intra-state journey that Mohney was making but counsel both in oral argument and in brief, have extensively argued this question and we have given it a very great deal of attention and we have no hesitancy in expressing our opinion upon the question, although we deem it unnecessary to a decision of the case.

In addition to the authorities hereinbefore cited, sustaining the proposition that a pass in this case was issued for a consideration, we cite the following cases as sustaining the conclusions we have reached:

Railroad Co. vs. Curran, 19 O. S. 1.
Knowlton vs. Railway Co., 19 O. S. 260.
Railway Co. vs. Kinney, 95 O. S. 64.
Railroad Co. vs. Lockwood, 17 Wallace's Rep. 357.
Coe vs. Errol, 116 U. S. 517.
Railway Co. vs. Voight, 176 U. S. 498.
Railway Co. vs. Adams, 192 U. S. 440.
Boering vs. Railway Co., 193 U. S. 442.
Railway Co. vs. Texas, 204 U. S. 403-413.
Railroad Commission of Ohio vs. Worthington, Receiver, 225 U. S. 101.
Southern Pacific Terminal Co. vs. Interstate Commerce Commission & Young, Young vs. Interstate Commerce Comimssion et al, 219 U. S. 498.
Railroad Co. vs. Sabine Tram. Co., 227 U. S. 111.
Southern Pacific Co. vs. Schuyler, 227 U. S. 601.
Railroad Co. vs. Thompson, 234 U. S. 576.

Robinson vs. Railroad Co., 237 U. S. 84.
Railroad Co. vs. Chatman, 244 U. S. 276.
White vs. Railway Co., 86 Southwestern Reporter, 962.

An examination of the cases to which I have called attention will clearly indicate that no general rule can safely be laid down applicable to cases generally determining what is and what is not an interstate transportation of passengers. Each case must rest upon its own attendant facts and all that we have said in this opinion relates distinctly, of course, to the case at bar and is in no sense to be read as an attempt to lay down general rules.

The judgment of the Court of Common Pleas will be affirmed.

CHITTENDEN AND RICHARDS, JJ., *concur.*

NEW YORK CENTRAL RAILROAD COMPANY *v.* MOHNEY.

CERTIORARI TO THE COURT OF APPEALS OF LUCAS COUNTY, STATE OF OHIO.

No. 196. Argued January 27, 1920.—Decided March 1, 1920.

A railroad employee was injured through a collision while traveling on his company's line between points in Ohio by means of a pass, good only between those points and within that State and containing a release from liability for negligence. His purpose was to continue the journey, partly over a line of another carrier in Ohio on which he would pay fare, and thence over one of his company into another State by means of another pass, the terms of which were not disclosed by the evidence. *Held*, that his travel, at time of injury, was intrastate, so that the validity of the release depended on the laws of Ohio. P. 155.

A stipulation on a free pass purporting to release the carrier from all liability for negligence is ineffective where injury to the passenger results from the wilful and wanton negligence of the carrier's servants. P. 157.

Affirmed.

THE case is stated in the opinion.

Mr. Howard Lewis, with whom *Mr. Frederick W. Gaines* was on the brief, for petitioner.

Mr. Albert H. Miller, with whom *Mr. A. Jay Miller* and *Mr. Charles H. Brady* were on the brief, for respondent.

MR. JUSTICE CLARKE delivered the opinion of the court.

The respondent, whom we shall refer to as the plaintiff, brought suit against the petitioner, defendant, to recover damages for severe injuries which he sustained in a rear-end collision on defendant's railroad, which he averred was caused by the gross negligence of the engineer of the

train following that on which he was a passenger, in failing to look for and heed danger signals, which indicated that the track ahead was occupied. The plaintiff was employed by the defendant as an engineer, with a run between Air Line Junction, at Toledo, and Collinwood, a suburb of Cleveland, wholly within the State of Ohio. As an incident to his employment he was given an annual pass, good between Air Line Junction and Collinwood, which contained the release following: "In consideration of receiving this free pass, each of the persons named thereon, using the same, voluntarily assumes all risk of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence of itself, its agents, or otherwise, for any injury to his or her person, or for any loss or injury to his or her property; and that as for him or her, in the use of this pass, he or she will not consider the company as a common carrier, and liable to him or her as such.

"And, as a condition precedent to the issuing and use thereof, each of the persons named on the face of this pass states that he or she is not prohibited by law from receiving free transportation, and that the pass will be lawfully used."

Having been informed that his mother had died at her home near Pittsburgh, Pennsylvania, the plaintiff, desiring to attend her funeral, applied to the defendant for, and obtained, a pass for himself and wife from Toledo to Youngstown, Ohio, via Ashtabula, and was promised that another pass for himself and wife would be left with the agent of the company at Youngstown, good for the remainder, the interstate part, of the journey to Pittsburgh. But the line of the defendant via Ashtabula to Youngstown was much longer and required a number of hours more for the journey than it did to go via Cleveland, using the Erie Railroad from that city to Youngstown, and for this reason, the record shows, the plaintiff Mohney,

before leaving home, decided that his wife should not accompany him and that he would make the journey by a train of the defendant, which used its own rails to Cleveland, and from Cleveland to Youngstown used the tracks of the Erie Railroad Company, and at Youngstown returned to the road of the defendant, over which it ran to Pittsburgh. The transportation which he had received via Ashtabula could not be used over the shorter route and therefore the plaintiff presented his annual pass for transportation from Toledo to Cleveland, intending to pay his fare from Cleveland to Youngstown over the Erie Railroad, leave the train at the Erie station at Youngstown, inquire by telephone as to the time and place of the burial of his mother, and then go to the New York Central station, a half mile away, obtain the pass which was to be left there for him, and go forward to Pittsburgh on the next convenient train.

The train on which Mohney was a passenger was wrecked between Toledo and Cleveland. It had come to a stop at a station and the second section of the train ran past two block signals, indicating danger ahead, and collided with the rear car of the first section, in which Mohney was riding, causing him serious injury.

The case was tried on stipulated facts and the testimony of the plaintiff. The trial court concluded that Mohney, at the time he was injured, was on an intrastate journey using an intrastate pass, and that by the law of Ohio the release upon it was void as against public policy. Thereupon, a jury being waived, the court entered judgment in plaintiff's favor.

The State Court of Appeals, differing with the trial court, concluded that Mohney was an interstate passenger when injured and that the release on the pass was valid, under the ruling in *Charleston & Western Carolina Ry. Co. v. Thompson*, 234 U. S. 576. But the court went further and affirmed the judgment on two grounds; by a divided

court, on the ground that the pass was issued to Mohney as part consideration of his employment, and, all judges concurring, for the reason that "we are clearly of the opinion that the negligence in this case, under the evidence, was willful and wanton." For these reasons it was held that the release on the pass did not constitute a defense to the action.

The Supreme Court of the State denied a motion for an order requiring the Court of Appeals to certify the record to it for review and the case is here on writ of certiorari.

The propriety of the use of the annual pass by Mohney for such a personal journey and that the release on it was not valid under Ohio law, were not questioned, and the sole defense urged by the Railroad Company was, and now is, that his purpose to continue his journey to a destination in Pennsylvania rendered him an interstate passenger, subject to federal law from the time he entered the train at Toledo and that the release on the pass was valid, under 234 U. S. 576, *supra*.

The three freight cases on which the defendant relies for its contention that the plaintiff was an interstate passenger when injured, all proceed upon the principle that the essential character of the transportation and not the purpose, or mental state, of the shipper determines whether state or national law applies to the transaction involved.

Thus, in *Coe* v. *Errol*, 116 U. S. 517, the owner's state of mind in relation to the logs, his intent to export them, and even his partial preparation to do so, did not exempt them from state taxation, because they did not pass within the domain of the federal law until they had "been shipped, or entered with a common carrier for transportation to another State, or [had] been started upon such transportation in a continuous route or journey."

In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission and Young*, 219 U. S. 498, 527, the cotton seed

cake and meal, although billed to Galveston, were "all destined for export and by their delivery to the Galveston, Harrisburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination. . . . The case, therefore, comes under *Coe* v. *Errol*, 116 U. S. 517." The mental purpose of Young, and his attempted practice by intrastate billing, was to keep within the domain of the state law, but his contracts, express and implied, brought the discrimination complained of in the case within the scope of the Interstate Commerce Act.

In *Ohio Railroad Commission* v. *Worthington*, 225 U. S. 101, the Commission attempted to regulate the rate on "lake-cargo coal," because it was often billed from the mines to Huron, or other ports within the State, but this court found that the established "lake-cargo coal" rate was intended to apply, and in practice did apply, only "to such coal as [was] in fact placed upon vessels for carriage beyond the State" and obviously "by every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage." For this reason the enforcement of the order of the state commission was enjoined as an attempt to regulate and control interstate commerce. Here again it was the committing of a designated kind of coal to a carrier for transportation in interstate commerce that rendered the federal law applicable.

To what extent the analogy between the shipments of property and the transportation of passengers may profitably be pressed, we need not inquire, for in this case the only contract between the carrier defendant and the plaintiff was the annual pass issued to the latter. This written contract, with its release, is the sole reliance of the defendant. But that contract in terms was good only between Air Line Junction and Collinwood, over a line of track wholly within Ohio, and the company was charged

with notice when it issued the pass that the public policy of that State rendered the release upon it valueless. The purpose of the plaintiff to continue his journey into Pennsylvania would have been of no avail in securing him transportation over the Erie line to Youngstown, for that he must pay the published fare and very surely the release on the pass to Collinwood would not have attached to the ticket to Youngstown. Whether there was a similar release on the pass to Pittsburgh, which Mohney expected to get at Youngstown, the record does not disclose and it is of no consequence whether there was or not. The contract which the defendant had with its passenger was in writing and was for an intrastate journey, and it cannot be modified by the purpose of Mohney to continue his journey into another State, under a contract of carriage with another carrier, for which he would have been obliged to pay the published rate, or by an intended second contract with the defendant in terms which are not disclosed. The mental purpose of one of the parties to a written contract cannot change its terms. *Southern Pacific Co.* v. *Arizona*, 249 U. S. 472. For these reasons the judgment of the trial court was right and should have been affirmed.

But the Court of Appeals affirmed the judgment on two grounds, one of which was that all of the judges were "clearly of the opinion that the negligence in the case, under the evidence, was willful and wanton." This court does not weigh the evidence in such cases as we have here, but it has been looked into sufficiently to satisfy us that the argument that there is no evidence whatever in the record to support such a finding cannot be sustained.

A carrier by rail is liable to a trespasser or to a mere licensee wilfully or wantonly injured by its servants in charge of its train (Commentaries on the Law of Negligence, Thompson, §§ 3307, 3308, and 3309, and the same sections in White's Supplement thereto), and a sound public policy forbids that a less onerous rule should be applied to a

passenger injured by like negligence when lawfully upon one of its trains. This much of protection was due the plaintiff as a human being who had intrusted his safety to defendant's keeping. *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 603; *Chicago, Rock Island & Pacific Ry. Co.* v. *Maucher*, 248 U. S. 359, 363.

The evidence in the record as to the terms and conditions upon which the pass was issued to the plaintiff is so meager that, since it is not necessary to a decision of the case, we need not and do not consider the extent to which the case of *Charleston & Western Carolina Ry. Co.* v. *Thompson*, 234 U. S. 576, is applicable to an employee using a pass furnished to him seemingly as a necessary incident to his employment.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE DAY and MR. JUSTICE VAN DEVANTER concur in the result, being of opinion that Mohney was using the annual pass in an interstate journey and that to such a use of the pass the Ohio law was inapplicable, but that the releasing clause on the pass did not cover or embrace his injury because the latter resulted from wilful or wanton negligence, as to which such a clause is of no force or effect.